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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.,
PETITIONERS

v.

SWEET HOME CHAPTER OF COMMUNITIES
FOR A GREAT OREGON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Under Section 9(a)(1) of the Endangered Species Act of 1973, 16 U.S.C. 1538(a)(1), it is unlawful for any person (including a federal agency) to "take" an endangered or threatened species, except for certain "takes" that are incidental to otherwise lawful activities and authorized by the Secretary of the Interior under conditions designed to minimize and mitigate the impact on the species, 16 U.S.C. 1536(b)(4), 1539(a)(1). The Act defines the term "take" to include "harm." 16 U.S.C. 1532(19). The question presented is:

Whether the regulation promulgated by the Secretary in 1975 and 1981 that defines "harm" to include "significant habitat modification or degradation" that "actually kills or injures wildlife," 50 C.F.R. 17.3, is invalid on its face.

PARTIES TO THE PROCEEDINGS

The Secretary of the Interior, currently Bruce Babbitt, and the Director of the United States Fish and Wildlife Service, an agency within the Department of the Interior, currently Mollie H. Beattie, were the appellees in the proceeding below, where respondents Sweet Home Chapter of Communities for a Great Oregon, Betty F. Orem, Erickson Busheling, Inc., Southeastern Lumber Manufacturers Association, Inc., Southern Timber Purchasers Council, Ridgetree Logging Company, Shotpouch Logging Company, Jean Reynolds, Emmy G. Birkenfeld, and Pat McCollum, were appellants.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of the Interior, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The August 12, 1994, statements accompanying the court of appeals' denial of petitioners' petition for rehearing and suggestion for rehearing en banc (App., *infra*, 89a-99a) are reported at 30 F.3d 190. The March 11, 1994, opinion of the court of appeals on respondents' petition for rehearing (App., *infra*, 1a-41a) is reported at 17 F.3d 1463. The July 23, 1993, initial opinion of the court of appeals (App., *infra*, 42a-72a) is reported

at 1 F.3d 1. The opinion of the district court (App., *infra*, 73a-88a) is reported at 806 F. Supp. 279.

JURISDICTION

The court of appeals entered its initial judgment on July 23, 1993. The court of appeals thereafter granted respondents' petition for rehearing, and on March 11, 1994, it entered a new judgment that differed from its earlier judgment. Petitioners then sought rehearing of that new judgment, and the court of appeals denied that petition for rehearing on August 12, 1994. App., *infra*, 89a-99a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Pertinent provisions of the Endangered Species Act (§§ 3, 7, 9, and 10; 16 U.S.C. 1532, 1536, 1538, 1539) are reprinted at App., *infra*, 103a-114a.

2. The Secretary of the Interior's regulation defining "harm" for purposes of the Endangered Species Act, 50 C.F.R. 17.3, provides:

> *Harm* in the definition of "take" in the [Endangered Species] Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavorial patterns, including breeding, feeding or sheltering.

STATEMENT

This case concerns the facial validity of a regulation, 50 C.F.R. 17.3, promulgated by the United States Fish and Wildlife Service, an agency within the Department of the Interior, to define the term "harm" as it is used in the prohibition in Section 9 of the Endangered Species Act, 16 U.S.C. 1538(a)(1), against the "take" of

an endangered species. The regulation defines "harm" to mean an act that actually kills or injures wildlife, including significant habitat modification or degradation that has that effect. The district court sustained the validity of the "harm" regulation (as well as another challenged regulation). In its initial opinion, the court of appeals affirmed the judgment of the district court. On rehearing, the court of appeals held the regulation invalid insofar as it defines "harm" to embrace habitat modification, and the court of appeals reversed the district court's judgment to that extent.

1. The Endangered Species Act, 16 U.S.C. 1531 *et seq.* (ESA), "seeks to protect species of animals [and plants] against threats to their continuing existence caused by man." *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2135 (1992). The Act was passed in 1973 in response to increasing concern about the extent to which "various species of fish, wildlife, and plants * * * have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. 1531(a)(1). The purposes of the Act include providing "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. 1531(b). The ESA provides for protection of endangered and threatened species through a number of different techniques.[1]

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[1] Section 4 of the ESA, 16 U.S.C. 1533, provides for the determination and listing of species by the Secretary as "endangered" or "threatened." In making the determination regarding the listing of species, the Secretary is to consider, *inter alia*, "the present or threatened destruction, modification, or curtailment of its habitat or range." 16 U.S.C. 1533(a)(1)(A). "Endangered species" means "any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present

a. Section 9(a)(1) of the ESA (16 U.S.C. 1538 (a)(1)) provides, *inter alia*, that it is unlawful for any person to "take" any endangered species. By regulation, the "take" prohibition also applies to threatened species.[2] Section 3(19) of the ESA (16 U.S.C. 1532(19)) defines the term "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." The "take" prohibition may be enforced through suits for injunctive relief, 16 U.S.C. 1540(e)(6), as well as civil and criminal penalties, 16 U.S.C. 1540(a), and (b).

The Fish and Wildlife Services (FWS) promulgated a regulation in 1975 to define "harm" for purposes of the "take" prohibition in Section 9 of the ESA. 40 Fed. Reg. 44,412. As revised without substantive change in 1981, see 46 Fed. Reg. 54,748, the "harm" regulation (50 C.F.R. 17.3) provides:

> *Harm* in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

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an overwhelming and overriding risk to man." 16 U.S.C. 1532(6). "Threatened species" means "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. 1532(20). Endangered and threatened species are referred to collectively as "listed species."

[2] Under Section 4(d), 16 U.S.C. 1533(d), the Secretary may, by regulation, prohibit with respect to threatened species any act prohibited under 16 U.S.C. 1538(a)(1). The Secretary, through authority delegated to the Director of the Fish and Wildlife Service, extended the "take" prohibition in 16 U.S.C. 1538(a)(1) to threatened species. See 50 C.F.R. 17.31(a), 17.21(c)(1). Thus, except where special rules applicable to particular species otherwise provide, see 50 C.F.R. 17.40-17.48, the "take" prohibition applies to all listed species.

In promulgating the regulation, the Secretary concluded that a showing of actual death or injury to the species is necessary to constitute "harm." 46 Fed. Reg. 54,748 (1981). The Secretary explained, however, that "harm" is not limited "to direct physical injury to an individual member of the wildlife species." *Ibid.* Rather, "[d]eath or injury * * * may be caused by impairment of essential behavioral patterns [as a result of habitat modification] which can have significant and permanent effects on a listed species." *Ibid.* The Secretary emphasized that without a showing of such impacts, habitat modification does not "harm" the species and cannot be considered a take. "[H]abitat modification or degradation, standing alone, is not a taking pursuant to section 9." 46 Fed. Reg. 54,750 (1981).

In 1982, Congress enacted Section 10(a)(1)(B) of the Act, which authorizes the Secretary to permit a taking that would otherwise be prohibited under Section 9(a)(1)(B), if such taking is "incidental to, and not [for] the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. 1539(a)(1)(B). The Secretary may not issue such an "incidental take permit" unless the applicant submits a conservation plan and the Secretary finds, *inter alia*, that the applicant will, "to the maximum extent possible, minimize and mitigate the impact of [such] taking," that "the applicant will ensure that adequate funding for the plan will be provided," that "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild," and that the applicant will take "such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan." 16 U.S.C. 1539(a)(2)(A) and (B).

b. In addition to Section 9, the ESA includes other methods of protecting endangered and threatened species. Section 4 authorizes the Secretary to designate "critical habitat" for listed species (see note 4, *infra*), and to

develop recovery plans to provide for the conservation and survival of such species. 16 U.S.C. 1533(a)(3), 1533(f). Section 5 of the Act directs the Secretary to utilize land acquisition and other authority under other wildlife protection statutes to acquire land for the purpose of conserving endangered species. 16 U.S.C. 1534.

Section 7 applies to federal agencies, and provides that they "shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of [the Act] by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. 1536(a)(1).[3] In addition, in consultation with the Secretary, federal agencies must "insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined * * * to be critical,[4] unless such agency has been granted an exemp-

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[3] Section 3(3) of the Act, 16 U.S.C. 1532(3), defines "conservation":

> The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

16 U.S.C. 1532(3).

[4] The Act defines "critical habitat" for a threatened or endangered species to mean:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed * * *, on which are found those physical or biological features (I) essential to

ton for such action * * * pursuant to subsection (h)." [5] 16 U.S.C. 1536(a)(2). The Section 7 process applies to an agency's issuance of licenses and permits to private parties, as well as actions undertaken by the agency itself. See 16 U.S.C. 1536(a)(3).

In 1982, Congress provided a mechanism for authorizing "incidental takes" by federal agencies, just as it did for such takes by private parties. See page 5, *supra*. Under the 1982 amendments, the Fish and Wildlife Service must prepare, as part of the biological opinion it furnishes to the agency during the Section 7 consultation process, what is known as an "incidental take statement." See 16 U.S.C. 1536(b)(4). That statement specifies the impact of any take that is anticipated to occur incidental to the proposed federal action as well as the "reasonable and prudent measures" that the Secretary considers "necessary or appropriate to minimize such impact," and sets forth the "terms and conditions * * * that must be complied with by the Federal agency or applicant [6] (if any), or both, to implement the measures specified." 16 U.S.C. 1536(b)(4)(B).[7]

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the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed * * * upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. 1532(5)(A).

[5] Subsection (h) of Section 7 provides for the granting of an exemption from the prohibitions of Section 7 by a specially constituted Endangered Species Committee. See 16 U.S.C. 1636(e)-(n).

[6] The term "applicant" refers to an applicant seeking a permit or license from a federal agency.

[7] Authorization for exemptions from the taking prohibition in Section 9 in certain circumstances was enacted in 1978 as part of the special exemption procedure under subsections (e)-(n) of Section 7. See 16 U.S.C. 1536(*o*).

There often is some overlap among the provisions of the Act applicable to federal agencies. For example, within Section 7(a)(2) itself, issues considered in determining whether a federal action is "likely to jeopardize the continued existence" of a listed species may overlap with those relevant to determining whether the action is likely to "result[] in the destruction or adverse modification" of habitat designated by the Secretary as critical for the species. 16 U.S.C. 1536(a)(2). Also, because federal agencies are subject to both Seciton 7(a)(2) and the "take" prohibition in Section 9, a particular action may cause a "taking" of an endangered species or threatened species, but not adversely affect the species to such an extent that it violates the "jeopardy" standard in Section 7(a)(2). So too, an action may result in the destruction or adverse modification of "critical habitat," and yet not result in a "take" of an endangered species because it does not "actually kill or injure wildlife." 50 C.F.R. 17.3.

2. Respondents are individuals and organizations in the Pacific Northwest and Southeast who are engaged in, or depend upon, timber harvesting. They allege that they are affected by the "harm" regulation because of its application to the northern spotted owl, which was listed as a threatened species in 1990, 55 Fed. Reg. 26,114, and the red-cockaded woodpecker, which was listed as an endangered species in 1970. 50 C.F.R. 17.11.[8]

Respondents brought this action as a facial challenge to 50 C.F.R. 17.3 (which defines "harm"), and 17.31(a) (which extends protections to threatened species) (see note 2, *supra*). Respondents did not challenge either regulation as applied to any of their own actions in relation to the listed birds.

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[8] The red-cockaded woodpecker was listed pursuant to authority under the Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275, a predecessor to the Endangered Species Act.

Respondents raised two claims with respect to the "harm" regulation.[9] First, they contended that the regulation failed under the first step of the analysis in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), because the regulation's inclusion of certain habitat modification activities within the meaning of "harm" was contrary to what in their view was an unambiguously expressed intent of Congress to exclude such activities from the statutory prohibition against "takes" of endangered species. Second, respondents claimed that the "harm" regulation is void for vagueness.

On cross-motions for summary judgment, the district court upheld the validity of the "harm" regulation, concluding that the "language, structure, and history of the ESA reveal that Congress intended an expansive interpretation of the word 'take,' an interpretation that encompasses habitat modification." App., *infra*, 82a-83a. The court stated that even if it were to find the ESA "silent or ambiguous" with respect to the issue, it would uphold the Secretary's regulation as a reasonable interpretation of the Act. *Id.* at 83a. The district court also held that the regulatory definition of "harm" was not void for vagueness. *Id.* at 83a-85a.

3. a. On July 23, 1993, a divided panel of the court of appeals initially affirmed the judgment of the district court. The court issued a brief *per curiam* order. App., *infra*, 46a. Chief Judge Mikva and Judge Williams wrote separate concurring opinions (*id.* at 59a, 67a), and Judge Sentelle dissented (*id.* at 68a).

b. Respondents filed a petition for rehearing, limited to the question whether the "harm" regulation is contrary to congressional intent. On March 11, 1994, the panel granted respondents' petition for rehearing and, in another divided decision, reversed the district court's judg-

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[9] The courts below sustained 50 C.F.R. 17.31(a), and this petition therefore is limited to the "harm" regulation.

ment with respect to the validity of the regulation defining "harm." [10] App., *infra*, 1a-24a. Judge Sentelle filed a concurring opinion (*id.* at 25a) and Chief Judge Mikva filed a dissenting opinion (*id.* at 27a).

The court of appeals concluded that the "harm" regulation was neither clearly authorized by Congress nor a reasonable interpretation of the statute, citing *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 842-843, 844. App., *infra*, 3a. The court acknowledged that the term "harm" may be read to include the sort of habitat modification covered by the regulation. It reasoned that "harm" should not be construed to cover such actions, however, because, in its view, the other words in the statutory definition ("harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect") "contemplate the perpetrator's direct application of force against the animal taken"—*e.g.*, "A hit B." *Id.* at 4a. The court applied the maxim "*noscitur a sociis*" (that a word is known by the company it keeps) and concluded that the term "harm" should be read in a similar manner. *Id.* at 5a-7a.

The court further concluded that the "structure and history of the Act confirm this reading." App., *infra*, 7a. It read the "harm" regulation as having "transposed to the private anti-'take' provision" the duty of federal agencies under Section 7(a)(2) to refrain from "'*the destruction or adverse modification of habitat* of such species which is determined * * * to be critical.'" *Ibid.* The court found that result to be contrary to the ESA, which assigned "the primary task of habitat preservation to the government," rather than to private parties. *Id.* at 8a. Finally, the court rejected the argument that the 1982 amendments to the ESA that authorized permits for "in-

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[10] The court's original judgment is otherwise unaltered. App., *infra*, 24a. Thus, the court of appeals adhered to its rulings that 50 C.F.R. 17.31 is valid and that the "harm" regulation is not void for vagueness.

cidental takings" reflected a congressional ratification of the Secretary's interpretation. *Id.* at 10a-24a.

In a concurring opinion, Judge Sentelle expressed the view that the statutory language and structure of the ESA provided a sufficient basis for invalidating the "harm" regulation and that resort to the legislative history was unnecessary. App., *infra,* 25a. He also reasoned that to define "harm" as the Secretary does would render superfluous the other words in the statutory definition of "take." App., *infra,* 25a.

Judge Mikva dissented. App., *infra,* 27a. He first objected that the majority erroneously shifted the burden to the government agency to show that its interpretation is clearly authorized or reasonable, whereas, under *Chevron,* the burden is on those challenging governmental action to show either that Congress has directly spoken on the issue or that the agency's interpretation is unreasonable. *Id.* at 28a. In this case, Judge Mikva concluded that the statute is silent, or at best ambiguous on the scope of the term "harm," so that the issue is whether the Secretary's interpretation of that term constitutes a permissible reading of the statute. He concluded that it does, expressing the view that the majority's application of *noscitur a sociis* was fatally flawed because the "definition of 'take' does not conform to the paradigm of one broad word alongside many narrow ones." App., *infra,* 30a.

Judge Mikva found additional support for the Secretary's interpretation in the legislative history of the ESA, including the 1982 amendments. The amendments, he reasoned, demonstrate that Congress thought that the original prohibition against "takings" included some "incidental takings," and that by "incidental takings" Congress meant to include certain habitat modification. App., *infra,* 37a. Finally, Judge Mikva pointed out that the court's ruling creates a conflict with the Ninth Circuit's decision in *Palila* v. *Hawaii Dep't of Land & Natural*

Resources, 852 F.2d 1106, 1107-1109 (9th Cir. 1988) (*Palila II*).

c. On April 25, 1994, petitioners filed a petition for rehearing with suggestion for rehearing en banc, which the court denied on August 12, 1994. App., *infra*, 89a-90a. Four members of the court of appeals voted to grant rehearing en banc. *Id.* at 90a. Three of those judges—Judge Silberman, joined by Chief Judge Mikva and Judge Wald—filed a statement expressing the view that applying *Chevron* deference, the interpretation of "harm" in the Secretary's regulation should be sustained. *Id.* at 98a.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in holding that the Secretary's longstanding regulation defining the term "harm" in the prohibition against the "taking" of endangered species in Section 9(a)(1) of the Endangered Species Act of 1973 is invalid on its face. That regulation is consistent with the ordinary meaning of the term "harm," reflects a reasonable administrative interpretation of the statutory provisions in the context of the Act as a whole, and is supported by the purposes and legislative history of the Act and by this Court's discussion of the predecessor regulation in *TVA v. Hill*, 437 U.S. 153, 184-185 & n.30 (1978). The contrary conclusion by the court below conflicts with *Palila* v. *Hawaii Dep't of Land & Natural Resources*, 852 F.2d 1106 (9th Cir. 1988), and is also inconsistent with decisions of other courts of appeals that have considered the "take" prohibition in the context of habitat modifications. The scope of the "take" prohibition is, in addition, a question of exceptional public importance in the administration of the ESA and the protection of endangered and threatened species. Review by this Court therefore is warranted.

1. a. To prevail in a facial challenge to a regulation, the plaintiff "must establish that no set of circumstances

exists under which the [regulation] would be valid." *Reno* v. *Flores*, 113 S. Ct. 1439, 1446 (1993), quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987); see also *INS* v. *National Ctr. for Immigrants' Rights*, 112 S. Ct. 551, 555 (1991); cf. *Bowen* v. *Yuckert*, 482 U.S. 137, 154 n.12 (1987). Thus, in this case, respondents were required to establish that in no set of circumstances could the statutory prohibition against the "taking" of a protected species include "harm" to the species that takes the form of "significant habitat modification or degradation" that "actually kills or injures wildlife." 50 C.F.R. 17.3. This respondents failed to do.

The term "take" is defined in the Act to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19). This case includes the meaning of one of those enumerated forms of taking: "harm." In ordinary usage, the word "harm," in its verb form, means "to cause hurt or damage to: INJURE," *Webster's Third New International Dictionary* 1034 (1986), or "to do or cause harm to; injure; damage; hurt," *The Random House Dictionary of the English Language* 873 (2d ed. 1987). This common understanding of the word includes the actual killing or injury of wildlife whether by means of modification or degradation of its habitat of by other causes. The statutory definition of "take" itself expressly includes "kill" and "wound," and there is no reason why Congress would have intended to allow those consequences simply because they are brought about by the destruction of habitat essential for the wildlife's breeding, feeding, or shelter, rather than by the discharge of a firearm or other direct application of force (the types of actions to which the court of appeals believed the prohibition is limited. App., *infra*, 4a).[11]

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[11] For example, a bulldozer clearing land may instantaneously kill an individual member of a species as well as cause the death

The presence of the words "harass" and "pursue" in the definition of "take" also weighs against the court of appeals' crabbed interpretation, for neither necessarily (or even ordinarily) involves the direct application of force.[12] Read in the context of the various other words in the definition of "take" that affirmatively support the Secretary's elaboration of the meaning of "harm," the court of appeals' reliance on the principle *noscitur a sociis* (App., *infra*, 6a-7a) was misplaced.

The assumption underlying the court's invocation of *noscitur a sociis* is that Congress must have intended for certain words in the definition of "take" that involve the application of physical force ("hunt," "shoot," "trap," "capture") to furnish a narrowing focus even with respect to other words, such as "harm," that have broader connotation. Whatever the merits of that proposition in other settings, it has no merit here, especially since the relevant statutory language contains a number of both broader and narrower terms. Congress's purpose in including the terms "harass" and "harm" was to ensure that the term "take" would have a broader meaning than it had been given in wildlife statutes such as the Migratory Bird

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of the entire species if the clearing activity destroys the whole habitat on which the species is dependent.

[12] For example, Congress intended that the "harass" prohibition allow the "Secretary to regulate or prohibit the activities of bird-watchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young." H.R. Rep. No. 412, 93d Cong., 1st Sess. 11 (1973). Notwithstanding the court of appeals' suggestion that the release of sound waves or light particles fits the model of "A hit B," App., *infra*, 4a, the Act's inclusion of what might otherwise be regarded as benign actions that would be encompassed by the word "harass" do not reasonably fit the paradigm of direct physical force applied against an animal. The House Report, quoted above, confirms that the "take" prohibition instead focuses on the "effect" of an action on the species.

Treaty Act (MBTA).[13] The court of appeals' focus on physical blows to the body of individual animals, by contrast, effectively mirrors the MBTA concept of "take." The majority's endeavor to maintain conformity with the narrowest terms defining "take" defeats the intent explicitly expressed by the responsible congressional committees (even before the more expansive word "harm" was added to the bill) that "take" have a broad scope and include actions having the effect of significantly disrupting a species' normal behavioral patterns.[14] See

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[13] The MBTA, 16 U.S.C. 703 *et seq.*, was enacted 55 years prior to the ESA for the purpose of halting the "indiscriminate slaughter of migratory birds." See, *e.g.*, 55 Cong. Rec. S5544-S5545 (daily ed. July 30, 1917); S. Rep. No. 2, 65th Cong., 1st Sess. (1917). The MBTA prohibits the taking of virtually every bird in the United States, not just endangered or threatened birds. The definition of "taking" under the MBTA, 16 U.S.C. 703 (1988 & Supp. V 1993), omits the words "harass" and "harm." See *Seattle Audubon Soc'y* v. *Evans*, 952 F.2d 297, 302-303 (9th Cir. 1991) ("Habitat destruction causes 'harm' to the owls under the ESA but does not 'take' them within the meaning of the MBTA."). When Congress enacted the Marine Mammal Protection Act in 1972 it included the word "harass" in the definition of "take." See 16 U.S.C. 1362(13) (Supp. V 1993). Then, when enacting the ESA in 1973, Congress enlarged the concept of "take" further by adding the word "harm" to the definition. See 16 U.S.C. 1532(19).

[14] The court's suggestion (App., *infra*, 9a-10a) that its narrow reading of "take" is supported by the failure of the Senate committee to adopt a proposed definition that made habitat modification a form of "take" disregards the circumstances surrounding the committee's action. The proposal before the committee would have made *any* habitat modification a "take." It did not include the limitations under the Secretary's narrower interpretation, which requires proof of significant modification and actual killing or injury as a result of significant impairment of essential behavioral patterns. In any event, the report gives no explanation of why the committee selected one proposed definition over the other, and the word "harm" was added during the floor debate purportedly to clarify language that was omitted from the draft that emerged from committee. 119 Cong. Rec. 25,683 (1973) (Sen. Tunney).

S. Rep. No. 307, 93d Cong., 1st Sess. 7 (1973) (" 'Take' is defined * * * in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife."); note 12, *supra*, quoting H.R. Rep. No. 412, 93d Cong., 1st Sess. 11 (1973).

Moreover, even if *noscitur a sociis* were properly invoked below, the court of appeals' characterization of the unifying theme of the statutory language is mistaken. The unifying concept of the specific terms chosen by Congress to define "take"—to "hunt, shoot, wound, trap, and collect," as well as the broader and more general terms "harass, harm, pursue" and "kill"—is that the conduct will result in some reasonably ascertainable and proximate injury (or death) to the protected species.[15] Thus, the statutory text does not compel the conclusion that the Secretary's regulation is invalid, as the court of appeals believed; the text affirmatively supports the validity of the regulation.

The 1982 amendments to the ESA reinforce the reasonableness of the Secretary's interpretation. In 1982, Congress acted to lessen the restriction imposed by the "take" prohibition by adding the provisions in Section 10 that authorize the issuance of permits allowing a "take" that is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. 1539(a)(1)(B). This description of the category of permitted "takes"—those that are merely "incidental" to otherwise lawful activity—surely encompasses those that result from the serious adverse consequences of habitat

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[15] The principle against surplusage, a maxim on which the concurring opinion below relied, App., *infra*, 25a, is also unenlightening. There is no reasonable definition of "harm" that would not render superfluous some of the other terms. Moreover, the principle against surplusage is in tension with *noscitur a sociis*. To avoid surplusage, the word "harm" must be given meaning that is different, rather than synonymous, with the other terms.

modification. Congress's provision of a mechanism for permitting such activities notwithstanding the "take" prohibition weighs against a construction of the prohibition that would not include such activities in the first place. Moreover, there is considerable evidence that, when it created the Section 10 permit program, Congress had specifically in mind incidental takes in connection with habitat modification activities. For example, the Section 10 incidental take permit process was described in H.R. Rep. No. 835, 97th Cong., 2d Sess. 30-32 (1982), and S. Rep. No. 418, 97th Cong., 2d Sess. 10 (1982), as being modeled after a situation in which the "take" of endangered butterflies was caused by the bulldozing of the butterflies' habitat in connection with "the development of some 300 dwelling units."[16] The incidental take permit provision was also intended to further the statutory purpose of habitat conservation. *Ibid.*[17]

b. Far from applying the standard for determining whether a regulation is invalid on its face (*i.e.*, whether there are any circumstances under which the regulation would be valid), the court of appeals took the opposite approach—it invalidated the "harm" regulation on the basis of imagined applications that were not before it. For example, the court of appeals stated that the regulation reflects an improbable relation to congressional intent

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[16] The cited development is described further in *Friends of Endangered Species, Inc.* v. *Jantzen*, 760 F.2d 976 (9th Cir. 1985); *Endangered Species Act of 1973: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 97th Cong., 2d Sess. 331-335 (1982) [*1982 House Hearings*].

[17] In addition, in the reauthorization hearings, objections to the regulatory definition of "harm" and proposals to change it were discussed in conjunction with the incidental take exemption. See *1982 House Hearings* at 240, 262, 273, 290-293, 328-329, 331, 343.

because it might forbid any modification of an area between 35 and 42 million acres in size because "some scientists" believe such an area is necessary to the survival of the threatened grizzly bear, even though the court acknowledged that such broad coverage represented the views of an "adherent of aggressive protection." App., *infra*, 6a.[18] By focusing only on extreme examples and the potential for unreasonably broad application of the regulation to specific species, the court of appeals failed

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[18] In the August 12, 1994, statement, the panel majority stated that in using that example, it understood that the regulation required that the habitat modification be "fatal" to grizzly bears. It explained that if millions of acres are necessary to the survival of grizzly bears then any material curtailment necessarily would involve death for members of the species. App., *infra*, 91a. The panel majority also stated, however, that it did not endorse the specific claim of what acreage might actually be necessary for the grizzlies. *Id.* at 91a n.1. That qualification is significant because it is unrealistic to assume that a take violation could be found with respect to any and all habitat modification activities based on such evidence.

The panel majority's August 12, 1994, statement also pointed to a Special Rule Concerning Take of the Threatened Coastal California Gnatcatcher, published at 58 Fed. Reg. 65,088 (1993), as evidencing that enforcement of the "harm" regulation entails Interior's exercise of power over large tracts of land. App., *infra*, 94a. The panel majority's reliance is misplaced, however, because the cited reference, 58 Fed. Reg. 65,090 (1993), is to a *state* planning process that encompasses 3.8 million acres. That area does not equate to gnatcatcher habitat, nor does the reference mean, as the panel majority suggests, that the "take" prohibition would apply to all habitat modification activities within that area. The Fish and Wildlife Service's issuance by special rule of an incidental take authorization for the gnatcatcher is largely the result of special circumstances in California whereby state law provides for a regional planning process that incorporates criteria that meet ESA incidental take standards. See 16 U.S.C. 1539(a)(2). The special rule effectively eliminates duplication of state, local and federal efforts and serves to reduce federal involvement.

to heed the limited nature of review accorded in a facial challenge.[19]

In any event, the court of appeals greatly exaggerated the breadth of the "harm" regulation. The court of appeals overlooked the fact that the evidentiary burden required to prove "actual death or injury" directly traceable to habitat-disturbing actions taken by a defendant imposes significant limitations on the regulation's application.

Prior to this case, the courts correctly interpreted the "harm" prohibition not to extend to activity that only potentially, as opposed to actually, causes (or will cause) harm. *American Bald Eagle* v. *Bhatti*, 9 F.3d 163, 166 (1st Cir. 1993) ("courts have granted injunctive relief only where petitioners have shown that the alleged activity has actually harmed the species or if continued will actually, as opposed to potentially, cause harm to the species"); see also *National Wildlife Fed'n* v. *Burlington N. R.R.*, 23 F.3d 1508, 1511-1513 (9th Cir. 1994)

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[19] The court of appeals also suggested that the regulation is unreasonable and overly broad because it is directed at harm flowing from the withholding of a benefit, rather than physical intrusions that wound an individual member of an endangered species. App., *infra*, 3a-4a. The August 12, 1994, statement reasserted that view and pointed to the Department of the Interior's commentary accompanying the "harm" rule, which stated that an "act" is inclusive of either commissions or "omissions" that would be prohibited by Section 9. App., *infra*, 91a; 46 Fed. Reg. 54,750 (1981). However, an "omission" constitutes an "act" prohibited by Section 9 only if there is a legal duty to act and the failure to discharge the duty causes a significant habitat modification that leads in turn to death or injury to a listed species. An example of such an omission might arise from a duty to maintain a licensed dam structure—a maintenance omission causing a dam breach could significantly destroy habitat and cause death or injury to a listed species as a result. The comment by the Department of the Interior does not encompass passive acts of nonfeasance or create a duty, where it otherwise would not exist, to maintain a listed species' habitat.

(corn spill was localized in nature and did not constitute significant habitat modification or cause significant impact); *Pyramid Lake Paiute Tribe of Indians* v. *United States Dep't of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990) (evidence does not establish that diversion of water actually caused spawning problems); *National Wildlife Fed'n* v. *National Park Serv.*, 669 F. Supp. 384 (D. Wyo. 1987) (insufficient evidence of injury from plan designed to reduce conflicts between humans and grizzly bear); *Morrill* v. *Lujan*, 802 F. Supp. 424, 430-433 (S.D. Ala. 1992) (insufficient evidence that destruction of mouse habitat would cause injury to mouse). By the same token, the courts that have found violations of the regulation have recognized that it applies only where actual injury or death directly traceable to the actions of the defendant has occurred or will occur. See, *e.g.*, *Palila* v. *Hawaii Dep't of Land & Natural Resources*, 639 F.2d 495, 498 (9th Cir. 1981) (*Palila I*); *Palila II*, 852 F.2d at 1108-1110; *Sierra Club* v. *Yeutter*, 926 F.2d 429 (5th Cir. 1991) (enjoining Forest Service from even-aged lumber practices following documentation of dramatic decline in red-cockaded woodpecker colonies directly traceable to lumbering practice); *United States* v. *Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1133 (E.D. Cal. 1992) (water district's pumping kills fish by creating water velocity that causes salmon to be pinned or battered against screens or by diverting fish into channels full of predators).

c. In sum, the Secretary's appropriately tailored regulation defining the term "harm" reflects a reasonable interpretation of the statutory term, and is supported by the structure of the Act as a whole and its purpose and legislative history. The court of appeals' contrary conclusion rests on an extravagant reading and speculative applications of the regulation, and thereby fails to respect both the limitations imposed by the Secretary's interpretation and application of his own regulation (see *Thomas*

Jefferson Univ. v. *Shalala*, 114 S. Ct. 2381, 2386 (1994)) and the nature of a facial challenge to a regulation.

2. a. The court of appeals' ruling conflicts with the Ninth Circuit's decision in *Palila II*, 852 F.2d at 1108. *Palila II* involved mouflon sheep that had been introduced in a particular area at an earlier time for the enjoyment of hunters, and a challenge to the maintenance of the sheep there because they feed on and destroy the mamane-naio woodlands upon which an endangered bird species, the Palila, depends for survival. The Ninth Circuit held:

> The Secretary's inclusion of habitat destruction that could result in extinction follows the plain language of the statute because it serves the overall purpose of the Act, which is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." . . . 16 U.S.C. § 1531(b). * * *
>
> The Secretary's construction of harm is also consistent with the policy of Congress evidenced by the legislative history. * * * If the "harassment" form of taking includes activities so remote from actual injury to the bird as birdwatching, then the "harm" form of taking should include more direct activities, such as the mouflon sheep preventing any mamane from growing to maturity.

Id. at 1108-1109.

Finally, the *Palila II* court concluded that the Secretary's "harm" definition is consistent with the legislative history of the 1973 Act stating that " '[t]ake' is defined in . . . the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." 852 F.2d at 1108, quoting S. Rep. No. 307, *supra*, at 7.[20] Similarly, the *Palila*

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[20] The United States filed a brief as *amicus curiae* in *Palila II* in support of affirmance of the district court's ruling that the destruction of certain vegetation constituted an unlawful "take"

II court noted that the 1982 ESA amendments supported the Secretary's interpretation because Congress did not modify the "take" prohibition, thereby "indicat[ing] satisfaction with the current definition of harm and its interpretation by the Secretary and the judiciary." 852 F.2d at 1109 n.6.[21]

The disruptive consequences of a circuit conflict between the District of Columbia and Ninth Circuits are especially pronounced in the present context. Because of the geographic features of the territory included within the Ninth Circuit and the species found therein, issues under the ESA arise more frequently there than in other circuits. At the same time, although the ESA does not confer any special jurisdiction on the District of Columbia Circuit, a litigant suing a federal officer (as in this case) may bring suit not only in the district where the property that is the subject of the action is situated, but also in the District of Columbia. 28 U.S.C. 1391(e)

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because it would lead to the extinction of the listed species by depriving it of its food source. The United States contended, however, that the district court had erred in holding that a "take" could result from habitat destruction that merely retards the recovery of a species. The Ninth Circuit affirmed that habitat degradation that would cause the extinction of a listed species constituted an unlawful "take." The court of appeals explicitly declined to reach the question whether habitat degradation that merely prevents recovery of an endangered species constitutes a "take." 852 F.2d 1110-1111.

[21] In fact, in *Palila I*, 639 F.2d at 498, the court of appeals had ruled that another habitat modification constituted an unlawful "take." The *Palila I* decision preceded, and was considered by Congress during deliberations on, the 1982 amendments to the ESA, as was the Fish and Wildlife Service's interpretation of the term "harm" to include habitat modification that actually kills or injures species. See *1982 House Hearings* at 273, 291, 331. *Palila I* also provided the impetus for the Secretary's rewording of the "harm" definition in 1981 to clarify that habitat modification *per se* does not constitute a take. See 46 Fed. Reg. 29,490, 29,492.

(1988 & Supp. V 1993). Accordingly, other persons who claim to be adversely affected by the Secretary's definition of "harm" may follow respondents' lead and bring an anticipatory action in the District of Columbia to take advantage of the precedent of the decision below. An enforcement action brought by the United States or in a citizen suit, on the other hand, generally must be brought in the district in which the defendant resides or the property is located. See 28 U.S.C. 1391(b) (Supp. V 1993). Thus, there is a real potential for the jurisdiction of the Ninth and D.C. Circuits to overlap with regard to activities in the circuit most affected by the "harm" regulation. This situation creates considerable uncertainty for private landowners and federal agencies, and the potential for non-uniform treatment within the Ninth Circuit.

b. The court of appeals' decision is also inconsistent with the decisions from other courts of appeals, which have recognized in the concrete context of particular applications of the "take" prohibition that a "take" of an endangered speices may result from habitat modification activities that cause harm to a species. See *American Bald Eagle* v. *Bhatti*, 9 F.3d 163 (1st Cir. 1993); *Sierra Club* v. *Yeutter*, 926 F.2d 429 (5th Cir. 1991); *Defenders of Wildlife* v. *Administrator, EPA*, 882 F.2d 1294 (8th Cir. 1989); see also *Palila I*, 639 F.2d at 497-498.

3. a. The issue in this case is one of exceptional importance. Since enactment of the ESA in 1973, the Secretary of the Interior has consistently interpreted the Act to prohibit "harm" caused by actions that significantly modify listed species' habitat to such an extent that the modification actually kills or injures the species. Although the number of prosecutions enforcing the "take" prohibition in the context of habitat-modification "harm" are relatively few, reliance on the regulation is far more prevalent than the number of prosecutions would suggest. Due to acceptance of the Secretary's interpretation, for example, numerous private parties have cooperated

in the formulation of scores of habitat conservation plans, which are a prerequisite to procurement of a Section 10 incidental take permit. See 16 U.S.C. 1539(a)(2)(A).[22]

The Secretary's "harm" regulation has also provided the impetus for (or recognition of) state and local conservation plans, which have provided the basis for developing special federal rules defining the conditions under which the "take" of a species would not be regarded as a violation of ESA Section 9.[23] Numerous other parties, including Georgia-Pacific, a large lumber company operating in the range of the red-cockaded woodpecker, have, through discussions with the Fish and Wildlife Service, modified plans to avoid all incidental takes by habitat destruction.[24] The court of appeals' decision threatens to undermine the significant protection to listed species afforded by such voluntary compliance. At the very least, the decision creates confusion for private landowners regarding the statutory requirements.

The court of appeals' decision also threatens to cause significant disruptions to federal actions. For example, the court of appeals' decision in this case provides the basis for one claim in a suit filed by environmental groups, *Seattle Audubon Soc'y* v. *Espy*, Civ. No. 92-479WD (W.D. Wash.), to challenge the final supplemental environmental impact statement concerning Forest Service and Bureau of Land Management planning doc-

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[22] See Attachment C to Federal Appellees' Response in Opposition to Motion of Sweet Home to Expedite Issuance of the Mandate (summarizing status of more than 150 habitat conservation plans submitted in connection with incidental-take permit applications).

[23] See 58 Fed. Reg. 65,088 (1993) (special rule concerning take of threatened coastal California gnatcatcher); 59 Fed. Reg. 5439 (1994) (notice of intent to prepare environmental impact statement to evaluate effects of issuance of incidental take permit that would allow private development in conjunction with conservation plan on public lands for the desert tortoise).

[24] Attachment D to Federal Appellees' Response in Opposition to Motion of Sweet Home to Expedite Issuance of the Mandate.

uments within the range of the northern spotted owl. Those documents were prepared to assess the impact of the President's proposed plan for 24 million acres of public land and to permit the lifting of the injunctions banning timber harvests on federal lands throughout the Pacific Northwest. The complaint in *Seattle Audubon Soc'y* relies on the court of appeals' ruling in this case to allege that the environmental documents are inadequate because they assume that private landowners' activities that "harm" protected species may be circumscribed. If the court of appeals' decision in this case renders that assumption incorrect, the plaintiffs assert, then insufficient federal land has been set aside for protection of listed species.

b. The prohibition against habitat modification that actually kills or injures species is a critical tool in the effort to preserve listed species. Most endangered and threatened species are at risk more often because of loss and degradation of habitat than because of any other factor. See *TVA* v. *Hill*, 437 U.S. 153, 179 (1978); Edward O. Wilson, *The Diversity of Life* 253, 346 (Belknap Press of Harv. Univ. Press 1992); Daniel J. Rohlf, *The Endangered Species Act: A Guide to its Protections and Implementation* 11 (Stan. Envtl. L. Soc'y 1989).

As Judge Silberman observed in his dissent from the order denying rehearing en banc, one can readily imagine habitat modification activities that cover a range of conduct falling within the core statutory concepts which animate the "take" definition as easily as one can imagine conduct that does not. App., *infra*, 98a. Thus, as this Court recognized in *TVA* v. *Hill*, 437 U.S. at 184 n.30, with specific reference to the definition of "harm" in the 1975 regulation, a dam project that causes the extinction of an endangered snail darter by destroying its entire habitat constitutes a "take." Similarly, the cutting of a nest tree in which an endangered species dwells and breeds

can effectively kill the bird, regardless of whether the bird is at home when the tree falls.

The Court observed in *TVA* v. *Hill*, that "[t]he plain intent of Congress in enacting [the ESA]"—"to halt and reverse the trend toward species extinction"—is reflected in the ESA's instruction to "[a]ll persons" not to "take" protected species. 437 U.S. at 184. The Secretary's interpretation of the term "harm" in the "take" prohibition to encompass significant modification or degradation of habitat that actually kills or injures protected species is supported by the text, structure and legislative history of the Act and furthers its central objectives.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 92-5255

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL., APPELLANTS

v.

BRUCE BABBITT, Secretary of the Interior, ET AL., APPELLEES

On Appeal from the United States District Court
for the District of Columbia Circuit (91cv01468)
On Appellants' Petition for Rehearing

Argued Feb. 17, 1993

Decided March 11, 1994

Rehearing and Suggestion for Rehearing
In Banc Denied May 2, 1994

Before: MIKVA, Chief Judge, WILLIAMS and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge WILLIAMS.

Concurring opinion filed by Circuit Judge SENTELLE.

Dissenting opinion filed by Chief Judge MIKVA.

STEPHEN F. WILLIAMS, Circuit Judge:

Sweet Home Chapter of Communities for a Great Oregon and a number of other organizations (collectively referred to here as "Sweet Home") sued in district court to invalidate a number of regulations promulgated by the Fish & Wildlife Service of the Interior Department under the Endangered Species Act of 1973 ("ESA" or the "Act"), 16 U.S.C. §§ 1531-44 (1988). The district court rejected all the challenges, 806 F.Supp. 279, and this court affirmed, unanimously except as to one issue. *Sweet Home Chapter v. Babbitt*, 1 F.3d 1 (D.C.Cir.1993). The issue that split the court involved the scope of the Act's prohibition of the "taking" of endangered species. On petition for rehearing, and after securing a response from the government, we alter our view on that issue.

The Act makes it a crime for any person to "take" any endangered species of fish or wildlife listed under the Act. ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B). A definitional section of the Act states that "take" means

> to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

16 U.S.C. § 1532(19). The Fish & Wildlife Service ("FWS") has in turn defined the component term "harm" in such a way as to encompass any "significant" habitat modification that leads to an injury to an endangered species of wildlife:

> *Harm* in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat

> modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 CFR § 17.3.

The government contends that the Act as originally adopted in 1973 authorized this expansive definition, and that even if it did not, a 1982 amendment to another provision of the ESA, specifically § 10(a)(1)(B) of the Act, 16 U.S.C. § 1539(a)(1)(B), either so changed the context of the "take" definition as to validate the Service's definition, or at any rate ratified that definition.

On petition for rehearing, we reject both theories. We find that the Service's definition of "harm" was neither clearly authorized by Congress nor a "reasonable interpretation" of the statute, see *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, 844, 104 S.Ct. 2778, 2781-82, 81 L.E.2d 694 (1984), and we find that no later action of Congress supplied the missing authority.

The language, structure and legislative history of the 1973 Act

The Fish & Wildlife Service found habitat modification within the idea of "harm", the most elastic of the words Congress used to define the acts that § 9 of the ESA forbids private individuals to commit. The potential breadth of the word "harm" is indisputable. In *Lucas v. South Carolina Coastal Council*, —— U.S. ——, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), for example, the Supreme Court, in exploring the just compensation requirement of the 5th Amend-

ment, observed that "the distinction between 'harm-preventing' and 'benefit-conferring' regulations is often in the eye of the beholder." *Id.* —— U.S. at — —,112 S.Ct. at 2897. As a matter of pure linguistic possibility one can easily recast any withholding of a benefit as an infliction of harm. In one sense of the word, we "harm" the people of Somalia to the extent that we refrain from providing humanitarian aid, and we harm the people of Bosnia to the extent that we fail to stop "ethnic cleansing". By the same token, it is linguistically possible to read "harm" as referring to a landowner's withholding of the benefits of a habitat that is beneficial to a species. A farmer who harvests crops or trees on which a species may depend harms it in the sense of withdrawing a benefit; if the benefit withdrawn be important, then the Service's regulation sweeps up the farmer's decision.

The immediate context of the word, however, argues strongly against any such broad reading. With the single exception of the word "harm", the words of the definition contemplate the perpetrator's direct application of force against the animal taken: "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect". The forbidden acts fit, in ordinary language, the basic model "A hit B."

For some of the words, to be sure, the application of force may not be instantaneous or immediate, and the force may not involve a bullet or blade. In the case of "pursue", the perpetrator does not necessarily catch or destroy the animal, but pursuit would always or almost always be a step toward deliberate capture or destruction, and so would be picked up by § 1532 (19)'s reference to "attempt[s]". While one may "trap" an animal without being physically present,

the perpetrator will have previously arranged for release of the energy that directly captures the animal. And one may under some circumstances "harass" an animal by aiming sound or light in its direction, but the waves and particles are themselves physical forces launched by the perpetrator. Interpreting "harass" in the Marine Mammal Protection Act, where it appears as one of the components of "take" (defined as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal"), the 9th Circuit applied *noscitur a sociis*, saying:

> The statute groups "harass" with "hunt," "capture," and "kill" as forms of prohibited "taking." The latter three each involve direct, sustained, and significant intrusions upon the normal, life-sustaining activities of a marine mammal; killing is a direct and permanent intrusion, while hunting and capturing cause significant disruptions of a marine mammal's natural state. Consistent with these other terms, "harassment," to constitute a "taking" under the MMPA, must entail a similar level of direct and sustained intrusion.

United States v. Hayashi, 5 F.3d 1278, 1282 (9th Cir. 1993). Accordingly the court overturned the defendant's conviction. Although he had fired a rifle twice into the water behind some porpoises, he had not harassed the porpoises within the meaning of the statute, as his acts were not "direct and significant intrusions upon the mammal's ordinary activities." *Id.* Here, the nine verbs accompanying "harm" all involve a substantially direct application of force,

which the Service's concept of forbidden habitat modification altogether lacks.[1]

The implications of the Service's definition suggest its improbable relation to congressional intent. Species dependency may be very broad. One adherent of aggressive protection, for instance, notes that "[s]ome scientists believe as many as 35 million to 42 million acres of land are necessary to the survival of grizzlies", about as much land in the northern Rockies of the United States and Canada as is still usable grizzly habitat. Rocky Barker, *Saving All the Parts* 34 (1993). And for an individual to "knowingly" violate § 9 means criminal penalties of up to a $100,000 fine and imprisonment for one year. See 16 U.S.C. § 1540(b); 18 U.S.C. §§ 3559(a)(6), 3571(b) and (e) (raising the maximum penalty).

Thus the gulf between the Service's habitat modification concept of "harm" and the other words of the statutory definition, and the implications in terms of the resulting extinction of private rights, counsel application of the maxim *noscitur a sociis*. "The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S.Ct. 1579, 1582, 6 L.Ed.2d 859 (1961). See also *Dole v. Steelworkers*,

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[1] Of course each of the terms in the "take" definition itself implies some degree of habitat modification. Setting a trap for an animal certainly modifies its habitat, as in a slightly different sense, does firing bullets at it. This obviously does not imply that habitat modifications as the Service uses the term are also encompassed.

494 U.S. 26, 36, 110 S.Ct. 929, 935, 108 L.Ed.2d 23 (1990) ("words grouped in a list should be given related meaning") (citations omitted).[2] The Service's interpretation appears to yield precisely the "unintended breadth" that use of the maxim properly prevents.

The structure and history of the Act confirm this reading. The ESA pursues its conservation purposes through three basic mechanisms: (1) a federal land acquisition program, ESA § 5, 16 U.S.C. § 1534; (2) the imposition of strict obligations on federal agencies to avoid adverse impacts on endangered species, ESA § 7, 16 U.S.C. § 1536; and (3) a prohibition on the taking of endangered species by anybody, ESA § 9, 16 U.S.C. § 1538. The Act addresses habitat preservation in two ways—the federal land acquisition program and the directive to federal agencies to avoid adverse impacts. The latter frames the duty in terms that the Service has now transposed to the private anti-"take" provision: every such agency is to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in *the destruction or adverse modification of habitat* of such species which is determined . . . to be critical", unless an exemption is granted. 16 U.S.C. § 1536(a)(2) (emphasis added). Thus, on a specific segment of society, the

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[2] "One hardly need rely on such Latin phrases as *ejusdem generis* and *noscitur a sociis* to reach this obvious conclusion [that "words grouped in a list should be given related meaning"]." *Third National Bank v. Impac Limited, Inc.*, 432 U.S. 312, 322 n. 16, 97 S.Ct. 2307, 2313 n. 16, 53 L.Ed.2d 368 (1977) (internal quotations omitted).

federal government, the Act imposes very broad burdens, including the avoidance of adverse habitat modifications; on a broad segment, every person, it imposes relatively narrow ones.

The legislative history reflects this balance, and confirms the intention to assign the primary task of habitat preservation to the government. Explaining the land acquisition program, Senator Tunney, the Senate floor manager for the ESA, stated: "Through these land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction." 119 Cong.Rec. 25669 (July 24, 1973). Representative Sullivan, the floor manager for H.R. 37—the House version of the bill—confirmed this approach:

> For the most part, the principal threat to animals stems from the destruction of their habitat. The destruction may be intentional, as would be the case in clearing of fields and forests for development of resource extraction, or it may be unintentional, as in the case of the spread of pesticides beyond their target area. Whether it is intentional or not, however, the result is unfortunate for the species of animals that depend on that habitat, most of whom are already living on the edge of survival. *H.R. 37 will meet this problem by providing funds for acquisition of critical habitat through the use of the land and water conservation fund.* It will also enable the Department of Agriculture to cooperate with *willing landowners* who desire to assist in the protection of endangered species, but who are understandably unwilling to do so at excessive cost to themselves.

119 Cong.Rec. 30162 (Sept. 18, 1973) (emphasis added). For habitat modification, then, Representative Sullivan saw the Act as providing duties for the government, with private persons acting only in the form of "willing landowners" assisted by the Department of Agriculture.

The floor managers differentiated loss of habitat from the hazard that was the target of the "taking" ban and the other prohibitions of § 9. After the passage quoted, Representative Sullivan went on to identify "[*a*]*nother* hazard to endangered species" which "arises from those who would capture or kill them for pleasure or profit. There is no way that the Congress can make it less pleasurable for a person to *take* an animal, but we can certainly make it less profitable for them to do so." *Id.* (emphasis added). Senator Tunney drew the same line:

> Although most endangered species are threatened primarily by the destruction of their natural habitats, a significant portion of these animals are subject to *predation by man for commercial, sport, consumption, or other purposes.* The provisions in S. 1983 would prohibit the commerce in or the importation, exportation, or taking of endangered species except where permitted by the Secretary.

119 Cong.Rec. 25669 (July 24, 1973) (emphasis added).

Congress's deliberate deletion of habitat modification from the definition of "take" strengthens our conclusion. As introduced before the Senate Commerce Committee, S. 1983 defined "take" as including "the destruction, modification, or curtailment of [a

species'] habitat or range." Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcomm. on Environment of the Senate Comm. on Commerce, 93d Cong., 1st Sess., at 27 (1973). A number of persons appearing before the Subcommittee on Environment explicitly endorsed this language and stressed its importance. See, e.g., testimony of John Grandy of the National Parks and Conservation Association, *id.* at 86; testimony of Tom Garrett, Wildlife Director of Friends of the Earth, *id.* at 104. Senators made the same point. See statement of Senator Moss, *id.* at 113; statement of Senator Williams, *id.* at 116. But the "take" definition of the version of S. 1983 submitted to the Senate omitted any reference to habitat modification, defining "take" to mean "harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." See 119 Cong. Rec. 25663 (July 24, 1973). In rejecting the Service's understanding of "take" to encompass habitat modification, "we are mindful that Congress had before it, but failed to pass, just such a scheme." *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, —— U.S. ——, ——, 114 S.Ct. 517, 526, 126 L.Ed.2d 524 (1993).

The effect of the 1982 amendments

Congress amended the Act in 1982, with two possible implications. First, one might argue that one of the amendments so altered the *context* of the definition of "take" as to render the Service's interpretation reasonable, or even, conceivably, to reflect express congressional adoption of that view. Second, one might argue that the process of amendment, which brought the Service's regulation and a judicial

endorsement to the attention of a congressional subcommittee, constituted a ratification of the regulation. We reject both theories.

1. The only legislative *act* from which the government claims support is the addition of ESA § 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B), which authorizes the FWS to issue permits for "any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." This language clearly implies that *some* prohibited takings are "incidental" to otherwise lawful activities. It does not follow, however, that such incidental takings include the habitat modifications embraced by the Service's definition of "harm". Harms involving the direct applications of force that characterize the nine other verbs of § 1532(19) pose the problem of incidental takings. The trapping of a non-endangered animal, for example, may incidentally trap an endangered species.

In fact, the key example of the sort of problem to be corrected by § 10(a)(1)(B) involved the *immediate destruction* of animals that would be *trapped* by a human enterprise. Northeast Utilities reported that it had sought to construct a nuclear plant on the Connecticut River. Dr. John P. Cagnetta explained on behalf of Northeast that the "EPA had concluded that Section 9 of the Act constituted a '*zero* taking' rule which would prohibit the *entrainment or impingement* of *any* Shortnose Sturgeon eggs, larvae or adults by the Montague intake structure." Endangered Species Act of 1973: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries ("Hearings"),

97th Cong., 2d Sess., at 358 (1982) (emphasis added). The "entrainment" and "impingement" of sturgeon eggs involve the crushing or capture of the eggs as a direct result of a human enterprise, just as would nets that catch fish driven in their way by the tides.

The sort of advance conservation plan authorized by § 10(a) makes complete sense for the kind of incidental taking exemplified by Northeast's dilemma. Dr. Cagnetta expressed concern that after the firm had invested $2 billion in the proposed plant, it might be subject to closure by injunction granted at the behest of a private person. *Id.* at 359. Section 10(a) provides procedural means by which to improve the trade-off between protecting endangered species and permitting normal development. Firms whose activities might incidentally "take" members of an endangered species can get *advance* protection from legal liability, but only if they convince the Secretary that the plan uses the maximum devices possible to mitigate and minimize species loss, and that the resulting losses will not unduly harm the species. See § 10(a)(2)(B)(ii) & (iv), 16 U.S.C. § 1539(a)(2)(B)(ii) & (iv).

Thus, adoption of § 10(a)'s permit plan, at least as evidenced by Northeast's instigating role, arose from interpretive assumptions about the meaning of "taking"—namely the EPA's views (1) that the perpetrator need not have *intended* to take the creature in question, and (2) that even the slightest taking would violate the Act (the "zero taking rule"). We need not explore the possible impact of these assumptions on the interpretation of "take"; a member of Congress might have supported the permit system on a completely agnostic premise about those interpretations: "There are some pretty wild inter-

pretations out there, and they may stick; if they do, it would certainly be helpful to have a mechanism for softening their impact." Normally, erroneous legislative assumptions about the meaning of an existing statute, even when they serve as the premise of an amendment, do not alter the meaning of unamended provisions. See *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 840, 108 S.Ct. 2182, 2191, 100 L.Ed.2d 836 (1988). Here, however, the matter is even easier, as the amendment involved no assumptions supporting the Service's position on habitat modification. So far the creation of the permit plan is concerned, the implicit assumptions simply do not embrace the idea that "take" included any significant habitat modification injurious to wildlife.

2. For its ratification theory, the government invokes (besides the § 10(a)(2) amendment itself) (a) language in the Conference on the 1982 amendments; (b) notice to a House subcommittee of the Service's habitat modification regulation and of a decision upholding it; and (c) the decision of a senator *not* to offer an amendment. We first examine these and then consider the cases on ratification of mistaken interpretations, on the basis of congressional awareness and peripheral action.

(a) *The Conference Report.* The government highlights some observations of H.R.Rep. No. 835, 97th Cong., 2d Sess. (1982) ("Conference Report"), 1982 U.S.C.C.A.N. 2807, speaking of the innovation made by § 10(a):

> This provision is modeled after a *habitat conservation plan* that has been developed by three Northern California cities, the County of San Mateo, and private landowners and developers

> to provide for the conservation of the habitat of three endangered species and other unlisted species of concern within the San Bruno Mountain area of San Mateo County.
>
> This provision will measurably reduce conflicts under the Act and will provide the institutional framework to permit cooperation between the public and private sectors in the interest of endangered species and *habitat conservation.*
>
> The terms of this provision require a unique partnership between the public and private sectors in the interest of species and *habitat conservation.* . . .

Id. at 30-31, *reprinted in* 1982 U.S.C.C.A.N. 2871-72 (emphasis added).

Although the passage thrice uses the phrase "habitat conservation," the first reference simply describes the particular plan on which the provision was modeled, while the second and third couple the phrase with, respectively, "the interest of endangered species" and "the interest of species." The focus is on the flexibility of the *relief* offered. The expectation that *relief* under the § 10(a) permit scheme would include habitat conservation does not imply an assumption that *takings* encompass habitat modification. Thus, if a nuclear plant will "entrain" and "impinge" sturgeon eggs, the area where this occurs will certainly not be hospitable for the sturgeon, and mitigation measures invited by § 10(a) might well include provision of alternative habitat. Similarly, although § 10(a) relief contemplates advancing "the interest of endangered species," it does not follow that every act detrimental to an endangered species constitutes a forbidden taking.

(b) *Notice of the regulation.* The Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries had notice of the regulation. See, e.g., Hearings at 290. In addition, speakers brought a decision of the 9th Circuit upholding the application of the ESA to habitat modification, *Palila v. Hawaii Dep't of Land & Natural Resources*, 639 F.2d 495 (9th Cir.1981), to the attention of subcommittee members in attendance. See Hearings at 329, 331. See also *id.* at 331, 426 (expressions of conflicting views on validity of interpretation of "harm" to encompass habitat modification). So far as appears, no congressional awareness of the Service's regulation or of *Palila* reached the floor of either House.

(c) *The withdrawn amendment.* The government says that Senator Garn proposed an amendment to change the definition of "take" but withdrew it voluntarily because he realized it did not have enough support for passage." Appellee Brief at 32. This falsely suggests a focus on "habitat modification" that was simply not there. In fact, the amendment that Senator Garn withdrew was not an isolated redefinition of the term "take," but a wholesale "rewrite" of the ESA[3]—the reading of which was

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[3] Senator Garn's proposed amendment included the following redefinition:

> The term "take" means purposefully to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct which is inimical to the continued existence of an endangered or threatened species. It does not include effects from

dispensed with on the Senate floor, and the text of which took 16 dense pages of legislative history. *A Legislative History of the Endangered Species Act of 1973, As Amended in 1976, 1977, 1978, 1979, and 1980* (U.S.Govt.1982) at 1080. The record reveals nothing to suggest any relation between Senator Garn's decision and congressional sentiment on the habitat modification issue.

By what standard are these features of the 1982 amendment process to be evaluated? Although the precedents are hardly in perfect harmony, the Supreme Court has generally refused to infer ratification from mere amendment of adjacent clauses in these circumstances. It has forcefully articulated reasons for this refusal. In *Girouard v. United States*, 328 U.S. 61, 66 S.Ct. 826, 90 L.Ed 1084 (1946), the Court concluded that it had erred in three prior cases holding that an alien who refused to bear arms could not be admitted to citizenship under the terms of the oath prescribed by Congress for naturalization. *Id.* at 61-69, 66 S.Ct. at 826-830. It then confronted a claim that Congress had impliedly adopted the rule of the earlier decisions, a claim to which the facts lent considerable support—*unsuccessful* efforts to change the rule, plus *reenactment* of the underlying language amid *change* of many related provisions. *Id.* at 69, 66 S.Ct. at 829 (emphasis added).

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normal forestry, farming, ranching, or water management practices.

A Legislative History of the Endangered Species Act of 1973, As Amended in 1976, 1977, 1978, 1979, and 1980 (U.S. Govt.1982) at 1082.

In dissent, Chief Justice Stone set out the principle that where a statutory provision has been subject to a controversial construction, reenactment without change implies congressional approval of that construction. *Id.* at 76, 66 S.Ct. at 833 (Stone, C.J., dissenting). The court, however, rejected this approach, and warned "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Id.* at 69, 66 S.Ct. at 830. It observed that congressional silence and inaction—actually, reenactment of the pertinent language—were "as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule as [the prior] cases." *Id.* at 70, 66 S.Ct. at 830.

Similarly, where Congress adopts amendments on the basis of misconception as to the meaning of a prior statute's related provisions, the later act does not turn the misconception into law. *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988), illustrates the principle. As originally enacted, the Employee Retirement Income Security Act ("ERISA") preempted state laws "as they may now or hereafter relate to any employee benefit plan" covered by the statute. ERISA § 514(a), 29 U.S.C. § 1144(a). After a number of lower courts construed § 514(a) to preempt state garnishment statutes, Congress in 1984 expanded the statutory list of exceptions to § 514(a), adding garnishments in support of domestic relations orders and thereby expressly eliminating ERISA's preemption of that narrow category. See ERISA § 514(b)(7), 29 U.S.C. § 1144(b)(7). Though the Court recognized that language in the House Committee report "suggest[ed] that the House

Committee in 1984 thought that § 514(a) foreclosed state-law attachment orders akin to those at issue here," *id.* at 840, 108 S.Ct. at 2191, i.e., garnishments outside the area of domestic relations, it refused to attach weight to that implicit suggestion. Rather, the Court said that "these views—absent an amendment to the original language of the section—do not direct our resolution of this case. Instead, we must look at the language of ERISA and its structure, to determine the intent of the Congress that originally enacted the provision in question. 'It is the intent of the Congress that enacted [the section] . . . that controls.' *Teamsters v. United States*, 431 U.S. 324, 354, n.39, 97 S.Ct. 1843, 1864 n. 39, 52 L.Ed.2d 396 (1977)." *Id.*

And in *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987), the Supreme Court refused to find implied ratification even though Congress amended closely related statutory sections and the Conference Report appeared to support the prevailing interpretation. The Court had, in *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953), construed certain provisions of the Securities Act of 1983 to bar enforcement of pre-dispute agreements to arbitrate for disputes under §12(2) of that act, despite the broad endorsement of arbitration in the previously adopted Federal Arbitration Act, 9 U.S.C. § 1 et seq. The issue in *Shearson/American Express* was whether similar provisions in the Securities Exchange Act of 1934 prevented enforcement of a pre-dispute arbitration agreement as to an alleged violation of § 10(b) of that Act, as the circuit courts of appeal had generally held.

After finding that the 1934 Act as originally enacted created no exception to the Arbitration Act, the Court turned to whether a later congressional intervention, the 1975 amendments to both the 1933 and the 1934 Acts—"the 'most substantial and significant revision of this country's Federal securities laws since the passage of the Securities Exchange Act in 1934' ", *Shearson/American Express*, 482 U.S. at 246, 107 S.Ct. at 2347 (Blackmun, J., dissenting)—altered that result. The 1975 amendments included a change in a section of the 1934 Act (§ 28(b)) closely related to those sections from which lower courts had drawn the inference against pre-dispute arbitration clauses, and the Conference Report had in connection with that change virtually endorsed *Wilko v. Swan*:

> It was the clear understanding of the conferees that this amendment did not change existing law, as articulated in *Wilko v. Swan*, 346 U.S. 427 [74 S.Ct. 182, 98 L.Ed. 168] (1953), concerning the effect of arbitration proceedings provisions in agreements entered into by persons dealing with members and participants of self-regulatory organizations.

H.R.Conf.Rep. No. 94-229 at 111 (1975), 1975 U.S.C.C.A.N pp. 179, 342 (1975) (quoted at *Shearson/American Express*, 482 U.S. at 236-37, 107 S.Ct. at 2343).

To Justice Blackmun, dissenting for himself and Justices Brennan and Marshall, this showed that Congress was clearly aware of the extension of *Wilko* to the 1934 Act and, at a minimum, that it was "not concerned with arresting this trend." 482 U.S. at 247, 107 S.Ct. at 2348. But the majority, although

finding some ambiguities in the remarks of the Conference Report, stressed the absence of any affirmative action by Congress in regard to the controlling sections: "We cannot see how Congress could extend *Wilko* to the [1934] Act without enacting into law any provision remotely addressing that subject." *Id.* at 237, 107 S.Ct. at 2343.

A variant on this theme is *TVA v. Hill*, 437 U.S. 153, 98 S.Ct. at 2279, 57 L.Ed.2d 117 (1978), involving claims that Congress's several appropriations for the Tellico Dam, made with full awareness of its risks to the snail darter and with express statements in various House and Senate Appropriations Committees' reports that the ESA was not meant to apply to this project, effectively exempted the dam from § 7 of the Act. Despite Congress's endorsement of the disputed project with the ultimate accolade—hard cash —the Court refused to find any exemption. *Id.* at 189-93, 98 S.Ct. at 2299-2301. The Court underscored the proposition that only congressional *committees* had expressed the understanding of § 7 that contradicted the Court's reading. *Id.* at 189, 193, 98 S.Ct. at 2299, 2301.

Our own decision in *State of Ohio v. U.S. Department of the Interior*, 880 F.2d 432 (D.C.Cir.1989), elaborates on the jurisprudential concerns raised by *Shearson/American Express*. The Court considered a situation where Congress had amended the key sections being construed *and* had reenacted the entire statute. Judge Ward wrote for the court:

> Were we to infer congressional approval of Interior's rules because it did not amend the statute to explicitly repudiate them, we would in effect be insisting that a Congress legislatively reiter-

> ate an already clear statutory command in order to fend off an impermissible interpretation. As we all know, many statutes are on the books for which no congressional majority could presently be garnered *either* to reenact *or* to repeal, yet those acts continue as valid law; indeed, a canon of equal worth with the acquiescence-by-reenactment rule is the one disfavoring repeal by implication. We conclude that the acquiescence-by-reenactment rule is not applicable to a situation where the regulations violate the original statutory language and where Congress' decision not to amend the relevant statutory provisions evidently stems from a belief that the provisions have been clear all along.

Id. at 458-59. Although the court evidently understood congressional inaction to stem from a belief that the statute had been "clear all along" (*against* the administrative interpretation), the ambiguity we pinpointed is relevant more broadly. Congressional inaction may indicate no more than the press of other business. As inaction is inadequate to *repeal* a law, it should be inadequate to *modify* a law. Yet modification is required to sustain an interpretation that is invalid as against the original legislation. Professor Tribe has pointed out that judicial reliance on congressional silence generates an elaborate buck-passing. The courts pass the buck to Congress by invoking the congressional inaction, and individual members of Congress can freely pass the buck back by pointing to the court's action. See Laurence H. Tribe, *Constitutional Choices* 33-34 (1985).

We do not pretend that the Court's treatment of this issue has been absolutely uniform. There are

cases indicating some readiness to infer ratification merely from amendment of related provisions (coupled with acute congressional focus on outstanding interpretation), and even from mere notice followed by inaction. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985), for example, the Court considered the Corps of Engineers' broad reading of "waters of the United States" in the 1972 Clean Water Act, and placed some weight on Congress's 1977 failure—in the course of making important amendments and after extensive floor debate—to modify the Corp's interpretation. "Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it." *Id.* at 137, 106 S.Ct. at 464. In *Bob Jones University v. United States*, 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983), the Court attached weight to the fact of Congress's awareness of IRS rulings that barred tax-exempt status for racially discriminatory schools, noting that 13 bills had been introduced over the years to overturn the rulings, none ever emerging from committee. *Id.* at 600, 103 S.Ct. at 2033. But the Court also observed that "[n]onaction by Congress is not often a useful guide". *Id.* More important, perhaps, Congress itself had, over the same period, adopted antidiscrimination prerequisites for private club exemptions, a closely parallel issue with obvious implications for the meaning of the general language exempting

charitable and educational institutions. *Id.* at 601-02, 103 S.Ct. at 2033-34. And in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986), the Court broadly suggested that congressional "revisit[ations]" of a statute after a longstanding administrative interpretation, coupled with failure to modify the interpretation suggested support for the agency view. *Id.* at 846, 106 S.Ct. at 3254. But in *Schor* the Court found the rejected reading of the statute inconsistent with the statutory language, *id.* at 841-42, 106 S.Ct. at 3251-52, and fraught with incongruities, see *id.* at 843-44, 106 S.Ct. at 3252-53, and also read the later amendments as "explicitly affirm[ing]" the agency's view, *id.* at 846, 106 S.Ct. at 3254.

These cases may ultimately not be fully reconcilable. We note, however, that the cases drawing inferences from inaction typically fail to address the serious jurisprudential problems of doing so—especially those captured in Judge Wald's observation that there are plenty of statutes "on the books for which no congressional majority could presently be garnered *either* to reenact *or* to repeal". *State of Ohio*, 880 F.2d at 458. It hardly seems consistent to enforce such statutes yet to accept non-amendment of an interpretation as the equivalent of congressional endorsement.

If the 1982 Congress had *reenacted* the pertinent sections of the ESA *and* "voice[d] its approval" of the FWS's interpretation, it might be appropriate to treat the reenactment as an adoption of that interpretation. *United States v. Bd. of Commissioners*, 435 U.S. 110, 134, 98 S.Ct. 965, 980, 55 L.Ed.2d 148 (1978). But see *Girouard*. Here, however, Congress

neither reenacted the sections having to do with "take", nor "voiced its approval" of the harm regulation. As we have seen, its creation of the permit scheme is fully consistent with the meaning of "take" as enacted in 1973; the other developments show no more than awareness of the Service's view, its survival in *Palila*, and the absence of any action to endorse or repudiate those developments.

* * * *

Accordingly, we hold invalid the Fish & Wildlife Service regulation defining "harm" to embrace habitat modifications. The judgment of the district court is reversed to that extent; otherwise, the judgment of this court in *Sweet Home Chapter v. Babbitt*, 1 F.3d 1 (D.C.Cir.1993), is unaltered.

So ordered.

SENTELLE, Circuit Judge concurring:

As I remain of the view expressed in my dissent in the original version of this case, *Sweet Home Chapter v. Babbitt*, 1 F.3d 1, 11 (D.C.Cir.1993) (Sentelle, dissenting), that the word "harm" in the context of the definition of "taking" in the Endangered Species Act of 1973 cannot reasonably be defined to include the broadly prohibited habitat modification encompassed in the challenged regulation, I am most pleased to concur in the decision of the Court. Now as then I find the words and structure of the Act sufficiently clear as to require no resort to legislative history. I therefore join with enthusiasm those portions of Judge Williams' opinion that rely on the structure of the Act and on the maxim of *noscitur a sociis*. I further note, as I did in my earlier dissent, that to define "harm" as broadly as does the Secretary is to render all other words in the statutory definition of "taking" superfluous in violation of the presumption against surplusage: "[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." 1 F.3d at 13 (quoting *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 837, 108 S.Ct. 2182, 2189, 100, L.Ed.2d 836 (1988)).

In view of the language and structure of the Act, and the principles of construction applied by Judge Williams and in my earlier dissent, I do not find it necessary to rely on the legislative history incorporated in Judge Williams's opinion. "[A]ppeals to statutory history are well taken only to resolve statutory ambiguity." *Barnhill v. Johnson*, —— U.S. ——, ——, 112 S.Ct. 1386, 1391, 118 L.Ed.2d 39 (1992) (internal quotation omitted). As the Su-

preme Court recently observed, "we do not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, —— U.S. ——, ——, 114 S.Ct. 655, 662, 126 L.Ed.2d 615 (1994). Because I find the meaning of "take" in the statute to be sufficiently clear that "I cannot cram the agency's huge regulatory definition" into any "tiny crack of ambiguity Congress left," 1 F.3d at 12. I concur in the decision to reverse the District Court judgment in part, but I would do so without resort to the legislative history.

MIKVA, Chief Judge, dissenting:

The majority's decision in this case is unfortunate. It scuttles a carefully conceived Fish and Wildlife Service ("FWS") regulation and creates a split in the circuits on an important statutory question. Despite the significance of the issue presented in this case, the majority insists on granting rehearing and reversing its earlier opinion without the benefit of additional oral argument, and without the benefit of additional briefing tailored to the court's concerns. What was rightly considered good law in the opinion in this case issued last year, published at 1 F.3d 1 (D.C.Cir.1993), is now "altered" on the basis of a confusing and misguided legal analysis that creates a needless conflict among the circuits. I dissent.

A. Standard of Review

The majority's first, and biggest, mistake is to jettison the *Chevron* standard. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Only once does the majority mention *Chevron*, conceding that it is supposed to govern our review of this case. But the majority concludes that the FWS's regulation is infirm under *Chevron* because "the Service's definition of 'harm' was neither clearly authorized by Congress nor a 'reasonable interpretation' of the statute." Maj. op. at 1464.

But the standard of review that we are bound to apply under *Chevron* actually reads as follows:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the

> question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43, 104 S.Ct. at 2781-82 (footnotes omitted).

Plainly, *Chevron* does not place the burden on the responsible agency to show that its interpretation is clearly authorized or reasonable. On the contrary, the burden is on the party seeking to overturn such an interpretation to show that Congress has clearly spoken *to the contrary*, or that the agency's interpretation is *un* reasonable. The whole point of *Chevron* deference is that when Congress has *not* given a clear command, we presume that it has accorded discretion to the agency to clarify any ambiguities in the statute it administers. In requiring the agency to justify its regulation by reference to such a clear command, the majority confounds its role. Ties are supposed to go to the dealer under *Chevron*.

Along with (and perhaps because of) this backwards reading, the majority also fails to note which step of *Chevron* is dispositive of the case. If it is step

one, the majority must show that Congress has "directly spoken to the precise question at issue": whether the word "harm" includes "significant habitat modification [that] actually kills or injures wildlife." Surely the statute is silent, or at best ambiguous, on this question. The Endangered Species Act ("ESA") nowhere defines "harm," and nowhere specifically prohibits the extension of that term to habitat modification. Under step two, the only question is whether the FWS's interpretation of the word "harm" constitutes a "permissible" reading of the ambiguous language. The question is *not*—however much the majority might like it to be—whether we think it constitutes the best reading. Under step two, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, *or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.*" *Chevron*, 467 U.S. at 843 n. 11, 104 S.Ct. at 2782 n. 11 (emphasis added).

B. Applying Chevron

Despite the command of *Chevron*, the majority substitutes its own favorite reading of the Endangered Species Act for that of the agency. But *Chevron* makes it irrelevant whether the majority's preferred interpretation is better than the agency's; the only question is the reasonableness of the agency's interpretation. And a fair reading allows for no other conclusion than that the agency's interpretation is reasonable.

The place to start is the statutory language. The ESA makes it unlawful to "take" a member of a species of fish or wildlife designated as "endangered"

by the FWS. 16 U.S.C. § 1538(a)(1)(B). "Take" is a defined term, meaning "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The regulation at issue in this case purports to define the term "harm" as "an act which actually kills or injuries wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife. . . ." 50 C.F.R. § 17.3. It is this definition that the majority finds unreasonable.

The majority relies primarily upon *noscitur a sociis*, a seldom-invoked principle of statutory construction. According to this canon, when a potentially broad word appears in a definition along with a list of narrow words, the broad word should be read narrowly to conform with its companions. This the majority purports to do here, finding that all the words in the definition of "take," other than the crucial word "harm," involve a "direct application of force." Ipso facto, the word "harm" must also be read to require a direct application of force, and habitat modification is not sufficiently direct to fall within this definition of "harm."

To this display of reasoning by the majority, one is tempted to respond, "Watch that first step; it's a big one." The definition of "take" does not conform to the paradigm of one broad word alongside many narrow ones, and thus the majority's decision to apply *noscitur a sociis* is fatally flawed. Instead, "take" includes several words that might be read as broadly, or nearly as broadly, as "harm": especially "harass," "wound," and "kill." Indeed, as the regulation at issue defines "harm" as an act (including habitat modification) that "actually kills or injures wildlife,"

the FWS might as easily have derived a proscription of habitat modification from the words "kill," "wound," and "harass," as from the word "harm."

In fact, the House Report specifically comments upon the breadth of the ESA's prohibition of "harassment," stating:

> ["Take"] includes harassment, whether intentional or not. This would allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young.

H.R.Rep. No. 93-412, 93rd Cong. 1st Sess. 11 (1973). Accordingly, FWS has defined the term "harass" nearly as broadly as the term "harm":

> *Harass* in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.

50 C.F.R. § 17.3. Appellants have not challenged this definition.

A more limited definition of "harass" was required (if at all) in *United States v. Hayashi*, 5 F.3d 1278 (9th Cir.1983), only because the word "harm" does not appear alongside "harass" in the Marine Mammal Protection Act; the only accompanying terms are "hunt," "capture," and "kill." 16 U.S.C. § 1362(13). By contrast, the ESA also includes the more expansive "harm," "wound," and "pursue," and is clearly meant to proscribe a broader range of activity. The

9th Circuit, the same court that decided *Hayashi*, has itself reached that conclusion, *Palila v. Hawaii Dep't of Land and Natural Resources*, 852 F.2d 1106, 1107-09 (9th Cir. 1988) (agency's interpretation of "harm" to include significant habitat modification is consistent with the language, purpose, and legislative history of the ESA), and today's contrary decision thus creates a foolish circuit conflict.

Noscitur a sociis means that a word is known by the company it keeps. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S.Ct. 1579, 1582, 6 L.Ed.2d 859 (1961). In the definition of "take," the term "harm" is accompanied by an assortment of words ranging from the precise and narrow "shoot" to the vague and expansive "harass." Gratuitous references to our nation's foreign policy aside, *see* Maj. Op. at 1464, "harm" is not a single elastic word among many ironclad ones but an ambiguous term surrounded by other ambiguous terms. Consequently, even if it is ever appropriate to measure an agency's construction of a statute against a seldom-used and indeterminate principle of statutory construction, this is not the place for *noscitur a sociis*.

Equally inappropriate is Judge Sentelle's use of the presumption against surplusage. There is no reasonable definition of the word "harm" (or, for that matter, the word "harass") that would not render superfluous some of the other defined terms. For example, one cannot "kill" or "wound" an animal without also "harming" it, even under the narrowest conceivable interpretation of "harm." Does that mean we must read "harm" out of the statute altogether? That would hardly be faithful to Congress's intent, which was to define takings "in the broadest possible

manner to include any conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S.Rep. No. 93-307, 93rd Cong., 1st Sess. 7 (1973), 1973 U.S.C.C.A.N pp. 2989, 2995. No, instead it means we must uphold the agency's reasonable accommodation of all the statutory terms. Defining "harm" to include "significant habitat modification" renders no more terms superfluous than would a definition that did not include habitat modification but did include "direct" forms of killing and wounding. And indeed, the majority's holding that "harm" cannot include indirect means of injuring wildlife may render "harm" itself superfluous, or nearly so, as "direct" means of injury are well covered by the other terms. The plain language of the statute, then, lends no support to the majority's contention that the FWS's interpretation of "harm" is impermissible.

The statute's purpose and legislative history provide equally insufficient grounds for rejecting the agency's interpretation. The majority, adopting the view of the appellants in this case, acknowledges that Congress intended to halt injurious habitat modification when it passed the ESA. It contends that Congress intended to combat this problem solely through § 1534's provision for federal land acquisition, and not through § 1538's prohibition of private takings.

According to the majority, the legislative history of the "take" provision establishes that Congress did not mean for that term to encompass habitat modification. It notes that the original bill that was referred to the Senate Committee on Commerce, S. 1983, defined "take" to include "destruction, modification, or curtailment of [an endangered species'] habitat or range." S. 1983, 93rd Cong., 1st Sess. § 3

(6) (1973). The bill reported out of committee, however, did not refer to habitat modification in the definition of "take." This omission, the majority finds, evinces Congress's intent not to include habitat modification within the scope of protected "takings." The majority also points to several statements from the floor suggesting that some members of Congress may have wanted land acquisition, not the prohibition of land uses, to be the ESA's sole weapon against habitat modification on private lands.

I find the legislative history to be most ambiguous regarding whether Congress intended to include habitat modification within the meaning of "take." It is true that the Senate Committee chose not to use the S. 1983 definition of "take," which specifically encompassed habitat modification. Instead, the Committee adopted a definition from the other bill under consideration, S. 1592, which did not explicitly include habitat modification. But as the district court noted, there is no indication in the legislative history as to why the Committee selected one definition over the other. And, in any event, the crucial ward "harm" was never voted on by the Committee but was added later on the floor of the Senate. It might well have been intended to cover the entire landscape originally contemplated by the S. 1983 definition. *See* 119 Cong. Rec. 25,683 (July 24, 1973) (Statement of Sen. Tunney) ("The amendments will help to achieve the purposes of the bill and will clarify some confusion caused by language remaining in the bill from earlier drafts or omitted from earlier drafts which went unnoticed during the final committee markup.").

Most importantly for our *Chevron* inquiry, there is nothing to suggest that Congress chose the definition

it did in order to *exclude* habitat modification. The Committtee may have rejected the S. 1983 definition only because it apparently would have made habitat modification a *per se* violation of the ESA, as opposed to leaving such determinations to the discretion of the responsible agency whose judgment this court today casts aside. Surely there is nothing to indicate that the Committee intended to foreclose an administrative regulation prohibiting habitat modification—particularly a prohibition accompanied by limitations, such as those contained in the FWS regulation under review, requiring that there be actual injury or death to wildlife.

In any case, Congress manifested no clear intent to exclude habitat modification from the "take" definition. Indeed, the Senate Committee Report states " 'Take' is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S. Rep. No. 93-307, 93rd Cong., 1 Sess. 7 (1973), 1973 U.S.C.C.A.N. p. 2995. And, as I have noted above, the bill reported out of Committee did not even include the word "harm" in the definition of "take." That was added later on the floor, in a "technical and clarifying amendment[]." 119 Cong.Rec. 25,682-83 (July 24, 1973) (Statement of Sen. Tunney). As the amendment added the word "harm," while subtracting nothing, that amendment can only have broadened the definition from the bill reported out of Committee —"clarifying" that "take" should be defined "in the broadest possible manner."

The contention that Congress intended land acquisition to be the exclusive instrument for curbing habitat modification on private lands is totally speculative. Nothing in the language of 16 U.S.C. § 1534 or in the

legislative history proves this sweeping assertion. The only evidence the majority can garner in support of its proposition is a few isolated and ambiguous remarks by members of Congress on the floor. *See* 119 Cong.Rec. 25,669 (July 24, 1973) (Statement of Sen. Tunney); 119 Cong.Rec. 30,162 (Sept. 18, 1973) (Statement of Rep. Sullivan). The general rule is that "debates in Congress expressive of the views and motives of individual members are not a safe guide . . . in ascertaining the meaning and purpose of the law-making body." *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474, 41 S.Ct. 172, 179, 65 L.Ed. 349 (1921). In any case, these statements do not establish that even the speakers themselves intended land acquisition to be the *exclusive* protective mechanism for habitats on private lands.

In sum, the majority has found nothing in the language, structure, purpose, or legislative history that unambiguously shows that "harm" does not encompass habitat modification. Under *Chevron*, that should dispose of the case: the FWS's gap-filling measure is a permissible exercise of its discretion as delegated by Congress. Moreover, not only is the majority's evidence ambiguous, but there is additional evidence supporting the *agency's* interpretation. I have already cited the Senate and House Committee Reports, which suggest that Congress envisioned a broad interpretation of "take," even before the crucial word "harm" was added to the definition of that term. S.Rep. No. 93-307, 93rd Cong., 1st Sess. 7 (1973) U.S.C.C.A.N. p. 2995 (" 'Take' is defined . . . in the broadest possible manner."); H.R.Rep. No. 93-412, 93rd Cong., 1st Sess. 15 (1973) (ESA "includes, in the broadest possible terms, restrictions on the taking,

importation and exportation, and transportation of [endangered] species, as well as other specified acts"); *id.* at 11 ("Harass" includes activities of bird-watchers "where the effects of those activities might disturb the birds and make it difficult for them to hatch or raise their young."). And I have adverted to the floor amendment that added the word "harm," purportedly to "clarify" language that was "omitted" from the draft that emerged from Committee. 119 Cong.Rec. 25,683 (July 24, 1973) (Statement of Sen. Tunney).

In addition, the agency's interpretation draws support from a subsequent amendment to the ESA. In 1982, Congress amended the ESA to include a provision authorizing the FWS to issue a permit allowing "any taking otherwise prohibited by section 1538 (a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B). By negative inference, this provision demonstrates that Congress thought at least some "incidental takings" must be prohibited by § 1538(a)(1)(B) in the first instance. The majority speculates on what Congress could have meant by "incidental takings," but the evidence quite clearly suggests that Congress meant habitat modification. The House Report states,

> This provision is modeled after a habitat conservation plan that has been developed by three Northern California cities, the County of San Mateo, and private landowners and developers to provide for the conservation of the habitat of three endangered species. . . .

> This provision will . . . provide the institutional framework to permit cooperation between the public and private sectors in the interest of endangered species and habitat conservation.

H.R.Rep. No. 97-835, 97th Cong., 2d Sess. 30-31 (1982), 1982 U.S.C.C.A.N. pp. 2871, 2872,

Moreover, the 1982 amendments came *after* the Secretary promulgated the present definition of "harm" at issue in this case. But instead of using the amendments as an occasion to overrule the Secretary's interpretation, Congress chose to allow the definition of "take" to stand, while amending another section of the statute—making clear in the process that it knew habitat modification could be (and was being) prohibited under the ESA. *See Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 n. 15, 105 S.Ct. 1620, 1629 n. 15, 84 L.Ed.2d 674 (1985) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n. 8, 95 S.Ct. 2362, 2370 n. 8, 45 L.Ed2d 280 (1975) (same); *Johnson v. Transportation Agency*, 480 U.S. 616, 629 n. 7, 107 S.Ct. 1442, 1450 n. 7, 94 L.Ed.2d 615 (1987) (congressional inaction after interpretation may be probative of approval).

Judge Williams devotes a large portion of his majority opinion to a refutation of this argument. I presume the reason for this emphasis is that he concurred in the initial panel opinion in this case solely on the ground that the 1982 amendments "support the inference" that the prohibition of takings includes a prohibition of some habitat modification.

1 F.3d at 11 (Williams, J., concurring). Having placed all of his eggs in that basket, he understandably finds it necessary to explain his error at length now that he has changed his mind.

I agree that Judge Williams was wrong the first time. He was wrong to rely solely on the 1982 amendments for his decision; I agree that they do not alone support its weight. They indicate that Congress in 1982 probably believed that habitat modification was properly covered by the prohibition on takings. Admitedly, the 1982 amendments prove little about Congress's intent in 1973, and had Congress in 1973 specifically stated that "take" does not include habitat modification the 1982 amendments would not save the FWS regulation. But Congress did no such thing in 1973; it was silent on the question. Consequently, the 1982 amendments do lend some weight to the reasonableness of the agency's definition—if Congress in 1982 believed the definition was reasonable, and the agency believed it was reasonable, then *Chevron* demands that we uphold the regulation unless we find solid evidence to the contrary. No such evidence exists.

Thus the court today moves from wrong to more wrong in attempting to parse this statute. Having forsaken the 1982 amendments as dispositive evidence, no effort is made to determine whether the agency could reasonably have relied on such amendments as persuasive evidence supporting its interpretation. Instead, the agency is asked to prove that the best interpretation of "harm" encompasses habitat modification. Beginning from a wrong premise, applying a wrong standard, it is not surprising that the wrong result is achieved.

Overall, there is nothing in the ESA itself, or in its legislative history, that unambiguously demonstrates that the term "harm" in the definition of "take" does not encompass habitat modification. Indeed, there is evidence to the contrary. *Chevron* commands that we defer to an agency's interpretation of a statute it is entrusted to administer, unless that interpretation is contrary to Congress's unambiguous command or an unreasonable exercise of Congress's vague or ambiguous delegation. The majority has not been so quick to ignore *Chevron* before. *See, e.g., Railway Labor Executives' Ass'n v. National Mediation Bd.*, 988 F.2d 133, 144-45 (D.C.Cir.) (Williams, J., dissenting) ("legislative silence [is] precisely the condition that under *Chevron* is understood to create a gap to be filled by the agency."), *vacated on motion for rehearing*, 996 F.2d 1271 (D.C.Cir.1993). Neither should it ignore *Chevron* today.

Finally, the majority should be even more hesitant to cast aside the agency's interpretation in light of the circuit split that this decision now creates. The Ninth Circuit determined, in *Palila v. Hawaii Dep't of Land and Natural Resources*, 852 F.2d 1106 (9th Cir.1988), that the FWS's "harm" definition was a permissible interpretation of the statute. "The Secretary's inclusion of habitat destruction that could result in extinction follows the plain language of the statute because it serves the overall purpose of the Act, which is 'to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved. . . .' 16 U.S.C. § 1531(b)." *Id.* at 1108. The purpose of the Endangered Species Act, lest we forget, is to protect endangered species. In today's abandonment of our decision of less than a year ago, this court takes a

large step backward from that purpose. The majority may believe it is making a good policy—but that is not our job. Under *Chevron*, we may overturn an administrative regulation only if it contradicts the agency's legislative mandate. Congress does not always speak as plainly as it might in designing administrative missions for the executive branch, so it is not always easy to decipher Congress's marching orders to an agency. But at least we ought to try. I dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 92-5255

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL., APPELLANTS

v.

BRUCE BABBITT, Secretary of the Interior, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia (91cv01468)

Argued Feb. 17, 1993

Decided July 23, 1993

Before MIKVA, Chief Judge; WILLIAMS and SENTELLE, Circuit Judges.

Opinion for the Court filed by Chief Judge MIKVA, except section II(A)(1), which is filed *per curiam*. Opinion concurring in section II(A)(1) filed by Chief Judge MIKVA. Opinion concurring in section II(A)(1) filed by Circuit Judge WILLIAMS.

Opinion dissenting in part filed by Circuit Judge SENTELLE.

MIKVA, Chief Judge:

Appellants, a group of non-profit citizens' groups, lumber companies, and lumber trade associations, oppose two regulations promulgated by the Fish and Wildlife Service ("FWS" or "agency") under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-44. They appeal a memorandum opinion and order by the district court upholding the regulations by summary judgment and denying appellants' own motion for summary judgment. We find that the challenged regulations are reasonable interpretations of the ESA. We also reject appellants' claim that one of the regulations is void for vagueness. We therefore affirm the district court's judgment.

I. BACKGROUND

The Endangered Species Act of 1973 is a multifaceted and comprehensive law directed toward halting the extinction of species. It is implemented primarily by the Fish and Wildlife Service, an agency of the Department of the Interior. The ESA employs a number of techniques to preserve endangered and threatened species, including land acquisition by the government, the implementation of conservation programs by federal agencies, and the prohibition of various federal and private actions that harm listed species.

Among the more important sections of the ESA is 16 U.S.C. § 1538(a)(1), which forbids any person from committing any of a broad array of activities deemed dangerous to the continued survival of endangered fish and wildlife species. This appeal focuses largely on the prohibition against "taking" an endangered species.

> [W]ith respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to . . . *take* any such species within the United States or the territorial sea of the United States[.]

16 U.S.C. § 1538(a)(1)(B) (emphasis added).

The ESA defines "take" as follows: "[T]o harass, *harm*, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (emphasis added). Much of the controversy surrounding this definition has concerned the meaning of "harm" and the degree to which this term encompasses damage to habitats. One of the FWS regulations challenged by appellants states:

> *Harm* in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

50 C.F.R. § 17.3 (as amended in 1981). Appellants contend that this regulation's inclusion of habitat modification within the meaning of "take" violates the ESA. They also assert that even if the regulation is not *ultra vires* of the ESA, it is not clear precisely what sort of habitat modification the regulation forbids. They therefore argue that this Court should either declare the regulation void for vagueness or adopt a limiting construction of the regulation, holding that "harm" occurs only where there is an inten-

tionally-caused actual physical injury to a specific member of a listed wildlife species.

The other regulation under review extends the protections for endangered species to threatened species as well. The ESA defines an "endangered species" as "any species which is in danger of extension throughout all or a significant portion of its range. . . ." 16 U.S.C. § 1532(6). The ESA also protects species that are in less immediate peril but are listed as "threatened species." This term refers to "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532 (20).

On its face, 16 U.S.C. § 1538(a)(1) applies its prohibitions, including the prohibition against takings, only to endangered species. However, the ESA allows the FWS to apply these prohibitions to threatened species, as well.

> Whenever any species is listed as a threatened species . . . the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife. . . .

16 U.S.C. § 1533(d).

Appellants challenge a FWS regulation which, at one fell swoop, brings all threatened fish and wildlife species into the protective net of 16 U.S.C. § 1538(a)(1).

> Except as provided in subpart A of this part, or in a permit issued under this part, all of the pro-

> visions in [50 C.F.R. § 17.21, the regulation implementing the section 1538(a)(1) prohibitions] shall apply to threatened wildlife. . . .

50 C.F.R. § 17.3(a) (1978). Appellants argue that this regulation violates the ESA, because § 1533(d) requires the FWS to extend the prohibitions to threatened species on a species-by-species basis and to do so only after making a specific finding that each such extension was "necessary and advisable."

The district court rejected appellants' challenges to both 50 C.F.R. § 17.3 and § 17.31(a) and granted summary judgment to the government. 806 F.Supp. 279. Because all of the issues in this appeal are issues of law, we will review the district court's judgment *de novo*.

II. ANALYSIS

A. The "harm" regulation

1. Compliance with the Endangered Species Act

Appellants argue that the "harm" regulation, 50 C.F.R. § 17.3, violates the ESA, because the statute excludes habitat modification from the types of forbidden actions that qualify as "takings" of species. They assert that the ESA's language and structure, as well as its legislative history, clearly demonstrate that Congress did not intend to prohiibt habitat modification when it defined "take" to include "harm" to an endangered species. 16 U.S.C. § 1532(19). They claim that the meaning of harm should therefore be limited to direct physical injury to an identifiable member of a listed wildlife species.

We hold, *per curiam*, that the "harm" regulation does not violate the ESA by including actions that modify habitat among prohibited "takings."

2. The "void for vagueness" claim

Appellants also maintain that, on its face, the "harm" regulation is void for vagueness. They point out that the Ninth Circuit has interpreted the regulation broadly so that prohibited "harm" includes habitat modification even without proof that death or physical injury to a specific member of a listed species has occurred. *Palila v. Hawaii Dept. of Land and Natural Resources*, 852 F.2d 1106, 1107-09 (1988). The appellants could also have mentioned that the FWS itself offered a similarly broad interpretation of the regulation when it introduced the current definition of "harm" in 1981:

> Some of the comments in favor of the redefinition . . . viewed the action as limiting "harm" to direct physical injury to an individual member of the wildlife species. This was not the intent of the Service and the final redefinition addresses that perception. The purpose of the redefinition was to preclude claims of a Section 9 taking for habitat modification alone without any attendant death or injury of the protected wildlife. Death or injury, however, may be caused by impairment of essential behavioral patterns which can have significant and permanent effects on a listed species.

46 Fed. Reg. 54,748, 54,748 (1981).

Appellants argue that so long as the regulation is subject to such broad constructions, it is impermissibly vague. They claim it will be left to the whims and predictions of biologists to determine when a habitat modification is "*significant*" and when such a modification "*significantly* impair[s] *essential* behavioral patterns." 50 C.F.R. § 17.3 (emphasis added). Prop-

erty owners, say appellants, will thus be subject to criminal sanctions under the ESA based on "some biologist's subjective view."

We are urged to address this problem by construing the regulation to state that "harm" occurs only where there is proof of an intentionally-caused physical injury to a specific member of a listed wildlife species. If we determine that the regulation does not require such proof, appellants contend that we should declare the entire regulation void for vagueness.

It is true, as appellants assert, that regulations with criminal sanctions must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). This principle, however, does not lead to the conclusion that any person can have a regulation wiped off the books (or prompt a limiting judicial construction of the regulation) merely by showing that it will be impermissibly vague in the context of some hypothetical application.

The seminal case concerning pre-enforcement facial challenges on the grounds of vagueness is *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). *Flipside* states that when a court examines such a challenge, "assuming the enactment implicates no constitutionally protected conduct, [the court] should uphold the challenge only if the enactment is impermissibly vague in *all of its applications*." *Id.* at 495, 102 S.Ct. at 1191 (emphasis added). Although the Supreme Court does not state precisely what it means by "constitutionally protected conduct," it is clear

that it is referring primarily to the First Amendment expressive freedoms, which have long received special protection in vagueness cases. *See, e.g. Smith, Sheriff v. Goguen*, 415 U.S. 566, 573, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974). It is equally clear that the Court is not referring to economic activity, which modern vagueness cases have invariably afforded less protection. *See, e.g., Flipside*, 455 U.S. at 498, 102 S.Ct. at 1193 ("economic regulation is subject to a less strict vagueness test").

Appellants, who are not currently the subject of an enforcement action under 50 C.F.R. § 17.3, nonetheless contend that the regulation will inhibit their ability to develop their land, especially by harvesting timber. In other words, the conduct implicated by this case is economic activity. (To the degree that appellants contend that the regulation results in a "taking" of their property in the Fifth Amendment sense, their remedy would be compensation, not a voiding of the regulation). In accordance with *Flipside*, we therefore will not find 50 C.F.R. § 17.3 void for vagueness unless the regulation is impermissibly vague in all of its applications.

In fact, the regulation contains features that prevent it from being invariably vague as applied. The definition of "harm" explicitly limits prohibited habitat modification to that which "actually kills or injures wildlife." 50 C.F.R. § 17.3. Moreover, in order to establish a civil or criminal violation under the "take" provision of the ESA or a regulation implementing that provision, the government must establish that the charged party *knowingly* violated the statute or regulation. 16 U.S.C. § 1540(a) and (b). The Supreme Court has recognized that "a

scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Flipside*, 455 U.S. at 499, 102 S.Ct. at 1193.

In light of these limitations, there are obviously types of activity, including habitat modification, that 50 C.F.R. § 17.3 clearly prohibits without a hint of vagueness. For example, it obviously forbids the very sort of conduct that appellants argue it should be limited to—habitat modification that causes ascertainable physical injury or death to an individual member of a listed species. Furthermore, § 17.3 unquestionably prohibits major acts of habitat degradation that destroy a species' ability to breed, feed, or shelter. For instance, a person aware of the regulation would be considered impermissibly vague. Unclear-cutting an entire forested area known to be populated by spotted owls.

Because the regulation is not vague in all of its applications, we may not declare it void on its face. We do not dismiss the possibility that some enforcement contexts may arise in which the challenged regulation would be considered impermissibly vague. Under *Flipside*, however, the fact that there might be some type of activity whose legality is blurry under the regulation does not render the entire regulation facially invalid. Specific vagueness concerns about the regulation can be addressed when and if they are properly raised in the framework of a concrete challenge to a particular application of the regulation.

Appropriate judicial restraint obligates us to wait for specific applications of the regulation to arise, for, as *Flipside* observed, the government may in the meantime take further steps "that will sufficiently narrow protentially vague or arbitrary interpreta-

tions" of the regulation. 455 U.S. at 504, 102 S.Ct. at 1196. "Although it is possible that specific future applications . . . may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise." *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 52, 86 S.Ct. 1254, 1265, 16 L.Ed.2d 336 (1966), *overruled on different grounds by Healy v. Beer Institute, Inc.*, 491 U.S. 324, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989).

B. The blanket extension of protections to all threatened species

Appellants also challenge 50 C.F.R. § 17.31(a), by which the FWS extended the 16 U.S.C. § 1538(a)(1) prohibitions as to endangered species to all threatened species as well. The FWS issued this regulation under the authority granted to it by the ESA at 16 U.S.C. § 1533(d). For the sake of convenience, we quote that provision again:

> Whenever any species is listed as a threatened species . . . the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife. . . .

16 U.S.C. § 1533(d).

The challenged regulation provides in relevant part:

> (a) Except as provided in subpart A of this part, or in a permit issued under this subpart, all of the provisions in § 17.21 [which implements the

> prohibitions contained in 16 U.S.C. § 1538(a)(1)] shall apply to threatened wildlife, except § 17.21(c)(5).
>
> * * * * *
>
> (c) Whenever a special rule in §§ 17.40 to 17.48 applies to a threatened species, none of the provisions of [paragraph (a)] of this section will apply. The special rule will contain all the applicable prohibitions and exceptions.

50 C.F.R § 17.31.

In short, the FWS has, with this regulation established a regime in which the prohibitions established for endangered species are extended automatically to all threatened species by a blanket rule and then withdrawn as appropriate, by special rule for particular species and by permit in particular situations. Although appellants' dissatisfaction is focused entirely on this treatment of the "take" prohibition, the regulation applies all of the § 1538(a)(1) prohibitions to threatened species in this manner.

Appellants contend that the FWS has created the system upside down, in violation of the ESA. They maintain that § 1533(d) requires the Secretary to extend the prohibitions to threatened species on a species-by-species basis. They also assert that the statute requires the agency to explain in each instance why it is "necessary and advisable" to apply the prohibitions to a threatened species.

We are not persuaded. As was the case with the "harm" regulation, there is no clear indication that § 17.31(a) violates the intent of the ESA. The statute does not unambigously compel the agency to expand regulatory protection for threatened species

only by promulgating regulations that are specific to individual species. In light of the substantial deference we thus owe the agency under the principles of *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed. 2d 694 (1984), we uphold the challenged regulation as a reasonable interpretation of the statute.

Appellants argue that the plain language of the ESA establishes that Congress intended regulations extending the § 1538(a)(1) prohibitions to threatened species to apply only to individual species. They focus on the first sentence of § 1533(d), pointing out its clear use of the singular. ("Whenever *any species* is listed as *a threatened species*. . . .") They maintain that in light of the first sentence's unambiguous reference to regulations for a single threated species, the phrase "any threatened species" in the second sentence must also refer to the singular. Appellants finally note that the Senate Report bolsters their interpretations of the language of § 1533(d) as authorizing regulation tailored to individual species.

> [The section] requires the Secretary, once he has listed *a species* of fish or wildlife as *a threatened species*, to issue regulations to protect *that species*. Among other protective measures available, he may make any or all of the acts and conduct defined as "prohibited acts" . . . as to "endangered species" also prohibited acts as to *the particular threatened species*.

S.REP. No. 93-307, 93d Cong., 1st Sess. 8 (1973), U.S.Code Cong. & Admin.News 1973, pp. 2989, 2996. (emphasis added).

It is however, less than clear that the language of § 1533(d) is actually intended to require regulations

extending the § 1538(a)(1) prohibitions to apply only to individual species. The reference to "any threatened species" in the second sentence of § 1538 (d) could just as easily mean "any or all threatened species." And appellants' claim that the clear meaning of the first sentence should control our interpretations of the second is not necessarily valid, for, as appellees argue, the two sentences may represent separate grants of authority. It is possible that it is the second sentence alone that grants the agency authority to extend the § 1538(a)(1) prohibitions to threatened species. *See infra* pp. 7-8.

Furthermore, in response to appellants' use of the Senate Report, appellees counterpose the use of plural language in the discussion of § 1533(d) in the House Report.

> The Secretary is authorized to issue appropriate regulations to protect endangered or threatened species; he may also make specifically applicable any of the prohibitions with regard to *threatened species* that have been listed in section 9(a) as are prohibited with regard to endangered species. Once an animal is on the threatened list, the Secretary has almost an infinite number of options available to him with regard to the permitted activities for *those species.* He may, for example, permit taking, but not importation of *such species*, or he may choose to forbid both taking and importation but allow the transportation of *such species.*

H.R.REP. NO. 93-412, 93rd Cong., 1st Sess. 12 (1973). The possible conflict between the two reports, as well as the apparent inconsistency within the above-quoted paragraph itself as to singular and plural, shows the

perils of attempting to use ambiguous legislative history to clarify ambiguous words within statutes.

In any case, even assuming that the reference to "any threatened species" in the second sentence of § 1533(d) is singular, the statute still would not clearly forbid the FWS from proceeding in the manner it did. Appellants impart inappropriate significance to the use of the singular versus the plural. The very first provision of the United States Code states, "In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . words importing the singular include and apply to several persons, parties, or things [and] words importing the plural include the singular." 1 U.S.C. § 1.

Furthermore, regardless of the use of singular and plural words, § 1533(d) simply does not speak directly to the question of whether the FWS must promulgate protections species-by-species or may extend such protection in a single rulemaking. We will rarely impose a particular procedural strategy on an agency when the relevant statute does not even explicitly address how the agency should proceed. "In [the] process of filling any gap left, implicitly or explicitly, by Congress, the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448, 107 S.Ct. 1207, 1221, 94 L.Ed.2d 434 (1987) (citations omitted).

Appellants attempt to bolster their argument by claiming that the design and structure of the ESA unavoidably require the FWS to extend the § 1533 (d) prohibitions to threatened species on a species-by-species basis. They contend that Congress created

the distinct categories of endangered and threatened species specifically so that each category would receive the precise degree of protection it required. By presumptively according the very same protections to threatened species as to endangered species, they argue, the FWS is violating this statutory design.

This argument also fails, because regardless of the ESA's overall design, § 1533(d) arguably grants the FWS the discretion to extend maximum protection to all threatened species at once if, guided by its expertise in the field of wildlife protection, it finds it expeditious to do so. In any case, even assuming that Congress intended there to be an indelible difference between the treatment of endangered species and threatened species, appellants fail to acknowledge the very real differences that exist even under the challenged regulation. As noted above, *supra*, p. 5, the regulation contemplates the issuance of "special rules" for individual threatened species. 50 C.F.R. § 17.31(c). The FWS has actually issued special rules for a substantial number of the fish and wildlife species listed as threatened. *See* 50 C.F.R. §§ 17.40-48.

Moreover, FWS regulations provide for the issuance of permits, under certain circumstances, to individual applicants who request permission to commit otherwise prohibited activities with respect to threatened wildlife. 50 C.F.R. § 17.32. Similar permits are available with regard to endangered species, 50 C.F.R. §§ 17.22-23, but the FWS has made clear that they are more readily available for threatened species.

> The new Subpart D would establish a set of blanket prohibitions for threatened wildlife. These are the same prohibitions that the Act pro-

> vides for endangered wildlife. . . . The new Subpart D would then provide for permits for any threatened wildlife. These permits would be more liberal than permits available under Subpart C . . . for endangered wildlife, in that they would be available for more purposes, and the strict procedural rules for endangered wildlife permits would not apply.

40 Fed.Reg. 28,713 (1975).

The FWS has thus maintained a two-tier approach to species protection. Consequently, even if the ESA does in fact mandate that the agency preserve different approaches to the conservation of endangered and threatened species, the regulatory scheme satisfies the statute.

Lastly, appellants claim that 50 C.F.R. § 17.31(a) violates the ESA because § 1533(d) requires the FWS to make individualized formal findings that the prohibitions are "necessary and advisable" for the conservation each threatened species to which they are extended. Not only did the agency fail to make such findings for each individual species; it did not even make such a finding in regard to the category of threatened species as a whole when it issued the blanket extension of prohibitions.

As appellees argue, however, there is a reasonable reading of § 1533(d) that would not require the FWS to issue formal "necessary and advisable" findings when extending the prohibitions to threatened species. According to this interpretation, the two sentences of § 1533(d) represent separate grants of authority. The second sentence gives the FWS discretion to apply any or all of the § 1538(a)(1) prohibitions to threatened species without obligating it

to support such actions with findings of necessity. Only the first sentence of § 1533(d) contains the "necessary and advisable" language and mandates formal individualized findings. This sentence requires the FWS to issue whatever other regulations are "necessary and advisable," including regulations that impose protective measures *beyond* those contained in § 1538(a)(1).

In sum, we find it far from clear that 16 U.S.C. § 1533(d) requires the FWS to extend protections to threatened species on a species-by-species basis or that it mandates that the agency issue formal findings of necessity to support each such extension. In light of the statute's ambiguity, the challenged FWS regulation is a reasonable and permissible construction of the ESA. We therefore uphold 50 C.F.R. § 17.31(a).

III. CONCLUSION

Neither the regulation defining harm nor the regulation extending blanket protection to threatened species is an unreasonable interpretation of the Endangered Species Act. Moreover, the "harm" regulation is not impermissibly vague on its face. We therefore affirm the judgment of the district court and uphold both regulations.

It is so ordered.

MIKVA, Chief Judge, concurring in Section II (A) (1) of the opinion:

I write separately in order to articulate fully my reasons for rejecting appellants' argument that we should set aside the "harm" regulation as violative of the ESA.

When we review an agency's construction of a statute that it is entrusted to administer, we follow the deferential approach set out by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). "If the statute is clear and unambiguous that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 1817, 100 L.Ed.2d 313 (1988) (citations omitted). If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2782. "In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844, 108 S.Ct. at 2782.

Appellants contend that Congress clearly intended to exclude habitat modification from the types of takings prohibited by the ESA and that this Court thus owes no deference to the FWS "harm" regulation. I disagree. In my view, the "harm" regulation conflicts with neither the ESA itself nor its ambiguous legislative history and is unquestionably a permissible and reasonable construction of the statute. I therefore do not accept appellants' claim that 50 C.F.R. § 17.3 transgresses the ESA.

It is hard to construct a legislative scenario in which Congress would have avoided the problem of habitat modification when it crafted the ESA. The drafters of the statute realized that the degradation of habitats posed one of the gravest threats to the continued existence of endangered and threatened species. As the Supreme Court has noted:

> In shaping [the ESA], Congress started from the finding that "[t]he two major causes of extinction are hunting and destruction of natural habitat." S.Rep. No. 93-307, p. 2 (1973). Of these twin threats, Congress was informed that the greatest was destruction of natural habitats. . . .

TVA v. Hill, 437 U.S. 153, 179, 98 S.Ct. 2279, 2294, 57 L.Ed.2d 117 (1978). Indeed, the first stated purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved. . . ." 16 U.S.C. § 1531(b).

Appellants acknowledge that Congress intended to halt injurious habitat modification when it passed the ESA. They contend only that Congress did not mean to combat habitat degradation on private lands through the prohibition against takings in 16 U.S.C. § 1538. They argue that Congress intended to combat this problem solely through § 1534's provision for federal land acquisition.

According to appellants, the legislative history of the "take" provision establishes that Congress did not mean for that term to encompass habitat modification. They note that the original bill that was referred to the Senate Committee on Commerce, S. 1983, defined "take" to include "destruction, modi-

fication, or curtailment of [an endangered species'] habitat or range." S. 1983, 93d Cong., 1st Sess., § 3(6) (1973). The bill reported out of committee, however, did not refer to habitat modification in the definition of "take." This omission, appellants argue, evinces Congress' intent not to include habitat modification within the scope of prohibited "takings."

Appellants maintain that Congress intended instead to address the problem of habitat modification caused by private actions on private lands exclusively through land acquisition by the federal government. Section 1534 authorizes the Secretary of the Interior, as well as the Secretary of Agriculture with respect to the National Forest System, to acquire land as part of "a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species. . . ." 16 U.S.C. § 1534(a). Appellants point to various statements in the legislative history that suggest that some members of Congress may have wanted land acquisition, not the prohibition of land uses, to be the ESA's sole weapon against habitat modification on private lands. Appellants further argue that Congress logically *must* have intended land acquisition to be the exclusive mechanism for preventing such habitat modification. Otherwise, they contend, agency officials would always choose the free alternative of prohibiting a damaging land use under the "take" provision, rather than paying to acquire the affected land.

I find the legislative history to be most ambiguous regarding whether Congress intended to include habitat modification within the meaning of "take." It is true that the Senate Committee chose not to use the S. 1983 definition of "take," which specifically encompassed habitat modification. Instead, the Com-

mittee adopted a definition from the other bill under consideration, S. 1592, which did not explicitly include habitat modification. But as the district court noted, there is no indication in the legislative history as to why the Committee selected one definition over the other.

There is nothing to suggest that Congress chose the definition it did in order to exclude habitat modification. The Committee may have rejected the S. 1983 definition only because it apparently would have made habitat modification a *per se* violation of the ESA. It is certainly possible that the Committee did not intend to foreclose an administrative regulation prohibiting habitat modification—so long as that prohibition was accompanied by limitations, such as those contained in the FWS regulation under review, requiring that there be actual injury or death to the species. In any case, Congress manifested no clear intent to exclude habitat modification from the "take" definition. Indeed, the Senate Committee Report states that " 'Take' is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S.REP. NO. 93-307, 93d Cong., 1st Sess. 7 (1973), U.S.Code Cong. & Admin.News 1973, 2995.

Appellants' contention that Congress intended land acquisition to be the exclusive instrument for curbing habitat modification on private lands is similarly speculative. Nothing in the language of 16 U.S.C. § 1534 or in the legislative history establishes that Congress meant land acquisition to be the only mechanism for habitat protection on private lands. The only evidence appellants can garner in support of their assertion to the contrary is a few isolated

and ambiguous remarks by members of Congress on the floor. *See* 119 CONG.REC. 25,669 (1973) (statement of Sen. Tunney); 119 CONG.REC. 30,162 (1973) (statement of Rep. Sullivan); 119 CONG.REC. 25,691 (1973) (statement of Sen. Nelson). The general rule is that "debates in Congress expressive of the views and motives of individual members are not a safe guide . . . in ascertaining the meaning and purpose of the law-making body." *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474, 41 S.Ct. 172, 179, 65 L.Ed. 349 (1921). In any case, these statements do not establish that even the speakers themselves intended land acquisition to be the *exclusive* protective mechanism for habitats on private lands.

There is also little force behind appellants' claim that including habitat modification within the meaning of "take" renders the land acquisition provision of § 1534 a nullity. Appellants suggest that agency officials will not pay to acquire land if they can accomplish the same habitat preservation objective without cost by banning the offending land use. But there are in fact many reasons why, in its effort to protect endangered and threatened species, the government might choose to acquire land rather than simply forbid damaging activity. Federal wildlife managers can surely do more to help such species on government-owned and controlled preserves than they could ever accomplish on private lands. Indeed, § 1534 land acquisition is explicitly designed to facilitate "conservation programs," a phrase that suggests a type of intervention more complex and proactive than simply forbidding certain activities on private lands.

Appellants argue that the agency must interpret the word "harm" narrowly so as not to include

habitat modification because none of the other "take" terms—"harass, . . . pursue, hunt, shoot, wound, kill, trap, capture, [and] collect"—represents a land use action that injures wildlife only indirectly. They argue that under the principle of statutory construction known as *noscitur a sociis*, a general term in a list should be interpreted narrowly "to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S.Ct. 1579, 1582, 6 L.Ed.2d 859 (1961).

Despite appellants' suggestions, however, the other prohibitions can limit a private landowner's use of his land in a rather broad manner. In particular, the prohibition against "harassment" can be used to supress activities that are in no way intended to injure an endangered species. The House Report stated:

> [Take] includes harassment, whether intentional or not. This would allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young.

H.R.REP. NO. 93-412, 93d Cong., 1st Sess. 11 (1973). Indeed, the FWS has defined "harass" in a way that is almost as broad as the "harm" definition:

> *Harass* in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to signficantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.

50 C.F.R. § 17.3. Appellants have not challenged this definition.

Noscitur a sociis means, literally, that a word is known by the company it keeps. *Jarecki*, 367 U.S. at 307, 81 S.Ct. at 1582. In the definition of "take," the term "harm" is accompanied by an assortment of words ranging from the precise and narrow "shoot" to the vague and expansive "harass." Consequently, even if I were willing to find an agency's construction of a statute to be impermissible based solely on a seldom-used and indeterminate principle of statutory construction, I would not do so in the present case.

Although the ESA is generally ambiguous as to whether the "take" prohibition forbids habitat modification, there is at least one feature of the statute that strongly suggests that Congress did in fact intend to include habitat modification within the meaning of "take." In 1982, Congress amended the ESA to include a provision authorizing the FWS to issue a permit allowing "any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B).

By allowing the agency, at its discretion, to permit "incidental takings," Congress implicitly confirmed that incidental takings were otherwise forbidden by the Act. And it is hard to imagine what "incidental takings" might be other than habitat modification. Indeed, the legislative history of the 1982 amendments reveals that habitat modification was precisely what Congress had in mind. The House Report states, "This provision is modeled after a habitat conservation plan that has been developed by three Northern California cities. . . . [It] will . . . provide the institutional framework to permit cooperation

between the public and private sectors in the interest of endangered species and habitat conservation." H.R.REP. NO. 97-835, 97th Cong., 2d Sess. 30-31 (1982), U.S.Code Cong. & Admin.News 1982, pp. 2807, 2871, 2872.

Overall, there is nothing in the ESA itself or in its legislative history that unambiguously demonstrates that the term "take" does not encompass habitat modification. Indeed, as I noted in my discussion of the 1982 amendments, there is evidence to the contrary. *Chevron* commands that unless it is absolutely clear that an agency's interpretation of a statute, entrusted to it to administer, is contrary to the will of Congress, courts must defer to that interpretation so long as it is reasonable. *Chevron*, 467 U.S. at 844, 104 S.Ct. at 2782.

In upholding the challenged regulation, we join the Ninth Circuit, which has similarly held that the agency's inclusion of habitat destruction in the definition of "harm" is a permissible interpretation of the ESA. That Circuit has stated that "[t]he Secretary's inclusion of habitat destruction that could result in extinction follows the plain language of the statute because it serves the overall purpose of the Act. . . ." *Palila v. Hawaii Dep't of Land and Natural Resources*, 852 F.2d 1106, 1108 (9th Cir.1988).

WILLIAMS, Circuit Judge, concurring in Section II(A)(1) of the opinion:

I agree that the "harm" regulation, 50 CFR § 17.3, complies with the Endangered Species Act—but *only* because of the 1982 amendments to the ESA. See Pub.L. 97-304, §§ 4(a)(2) and 6(1) (codified respectively at 16 U.S.C. §§ 1536(b)(4)(B) and 1539(a)(1)(B)). Those amendments, which authorize the FWS to issue permits for "any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity," 16 U.S.C. § 1539(a)(1)(B), support the inference that the ESA otherwise forbids some such incidental takings, including some habitat modification. But for the 1982 amendments, I would find Judge Sentelle's analysis highly persuasive—including his discussion of the *noscitur a sociis* canon. See *RLEA v. NMB*, 988 F.2d 133, 144 (D.C.Cir.1993) (Williams, J., dissenting) (characterizing the canon as a "powerful linguistic norm").

SENTELLE, Circuit Judge, dissenting:

As we have observed, "some will find ambiguity even in a 'No Smoking' sign." *International Union, United Auto, Aerospace and Agric. Implement Workers of Am. v. General Dynamics Land Sys. Div.*, 815 F.2d 1570, 1575 (D.C.Cir.1987). In the present case the Fish and Wildlife Service has established that it would not only find such ambiguity, but would deem a congressional authorization for the erection of "No Smoking" signs to authorize the adoption of regulations against chewing and spitting.

As Chief Judge Mikva notes, this case is governed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed. 2d 694 (1984). That decision mandates a two-step analysis. At the first step "we inquire into whether Congress has directly spoken to the precise question at issue. If we can come to the unmistakable conclusion that Congress had an intention on the precise question at issue, our inquiry ends there." *Nuclear Info. Resource Serv. v. Nuclear Regulatory Comm'n*, 969 F.2d at 1169, 1173 (1992) (en banc) (citations and internal quotation marks omitted). At the second step "if the statute . . . is silent or ambiguous with respect to the specific issue before us, . . . we defer to the agency's interpretation of the statute if it is reasonable and consistent with the statute's purpose." *Id.* (citations and internal quotation marks omitted). While I am willing to concede the possibility that some ambiguity may remain in the unusually specific recitation by Congress of its intent in defining the term "take," I cannot cram the agency's huge regulatory definition into the tiny crack of ambiguity Congress left.

As a colleague of ours has observed, "the second prong of the *Chevron* inquiry, whether an agency's interpretation of an ambiguous statutory provision is reasonable, is also not devoid of content." *National Ass'n for Better Broadcasting v. FCC*, 849 F.2d 665, 671 n. 3 (D.C.Cir.1988) (Wald, C.J., dissenting). In the present case, I see no reasonable way that the term "take" can be defined to include "significant habitat modification or degradation" as it is defined in 50 C.F.R. § 17.3. I have in my time seen a great many farmers modifying habitat. They modify by plowing, by tilling, by clearing, and in a thousand other ways. At no point when I have seen a farmer so engaged has it occurred to me that he is taking game. Nor do I think it would occur to anyone else that he was taking wildlife. He may be doing something harmful to wildlife, but he is not "taking" it.

In my view, the fact that the farmer may be indirectly harming wildlife, and that the statutory definition includes "harm" helps the agency's cause but little. To analogize again to the smoking proposition, if Congress authorized the erection of "No Smoking" signs in public buildings and thereafter defined smoking to include lighting, burning, puffing, inhaling, and otherwise harmfully employing the noxious nicotine-bearing tobacco products," some zealous bureau might well attempt to define smoking to include chewing and spitting under the rubric of the "harmful use" in Congress's definition of smoking. Perhaps some might think that reference to harm would cause the concept of smoking to include chewing. I do not think those creative regulators would be thinking reasonably if they should do so, nor do I think the regulators act reasonably in the present case.

As my colleage observes, there is an ancient "principle of statutory construction known as *noscitur a sociis*, a general word in a list should be interpreted narrowly 'to avoid the giving of unintended breadth to the Acts of Congress.' " Mikva Op. at 10, quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S.Ct. 1579, 1582, 6 L.Ed.2d 859 (1961). In the present statute, all the other terms among which "harm" finds itself keeping company relate to an act which a specifically acting human does to a specific individual representative of a wildlife species. In fact, they are the sorts of things an individual human commonly does when he intends to "take" an animal. Otherwise put, if I were intent on taking a rabbit, a squirrel, or a deer, as the term "take" is used in common English parlance, I would go forth with my dogs or my guns or my snares and proceed to "harass, . . . pursue, hunt, shoot, wound, kill, trap, capture, or collect" [1] one of the target species. 16 U.S.C. § 1532 (19). If I succeeded in that endeavor, I would certainly have "taken" the beast. If I failed, I would at least have "attempt[ed] to engage in . . . such conduct." *Id.*

All this falls neatly within a reasonable construction of "take," just as puffing a pipe falls neatly within the definition of smoking, and I would not dare to do such in front of a "No Smoking" sign. However, I would think it most unreasonable if a regulator told me that I could not chew nicotine gum in front of the same sign because the agency had decided that it was harmful and therefore constituted

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[1] The only word replaced by ellipses is "harm," the word under examination.

smoking. It appears to me that the Fish and Wildlife Service has engaged in a similarly unreasonable expansion of terms in the present case.

I do not find the unreasonableness of the Service's construction to be in any way alleviated by the Senate Committee Report stating that " '[t]ake' is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S.REP. No. 93-307, 93d Cong., 1st Sess. 7 (1973), U.S.Code Cong. & Admin.News 973, 2995 (quoted by Mikva Op. at 9). Should one committee of the anti-smoking Congress have included in its discussion of the "No Smoking" sign authorization language to the effect that " 'smoking' is defined in the broadest possible manner to include every conceivable way in which a person can 'smoke' or attempt to 'smoke' any form of tobacco," that still would not convince me that the term could be defined to include chewing. Nor does the majority's reliance on that same sort of legislative history convince me that Congress, by mandating the broadest possible manner of definition, intended to deprive the definition of any bounds whatsoever and turn the word into a free form concept inclusive of anything an agency might wish it to cover.

I am bolstered in my conviction by another rule of statutory construction: that is, the presumption against surplusage. "[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Mackie v. Lanier Collection Agency*, 486 U.S. 825, 837, 108 S.Ct. 2182, 2189, 100 L.Ed.2d 836 (1988). The construction placed upon the word "harm" by the agency and adopted by the court today

renders superfluous everything else in the definition of "take." If "harm" means any "act which actually kills or injures wildlife," including "habitat modification or degradation," I can see no reason why Congress also included in the definition of "take" the terms "harass, . . . pursue, hunt, shoot, wound, kill, trap, capture, [and] collect." 16 U.S.C. § 1532(19). Every single one of those acts, particularly when coupled with further language of the congressional definition which includes "to attempt to engage in any such conduct," *id.*, falls within the definition of "harm" as understood by the agency. I am unwilling to believe that Congress deliberately wasted the considerable ink and paper devoted to the many copies of this legislation containing all the other words in section 1532(19). I am, therefore, unwilling to accept the Service's definition in the present case, no matter how well intended.

Because I would void the regulation at this early stage, I would not reach the void-for-vagueness claim. I would observe, however, that I do not see how a definition as boundless as the agency conceives for the word "take" and the component "harm" of its definition could readily avoid being impermissibly vague.

I respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 91-1468

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL., PLAINTIFFS

v.

MANUAL LUJAN, JR., Secretary of the Interior, JOHN F. TURNER, Director, U.S. Fish and Wildlife Service, DEFENDANTS

May 29, 1992

MEMORANDUM OPINION

NORMA HOLLOWAY JOHNSON, District Judge.

Plaintiffs are various organizations, businesses and individuals, who depend directly or indirectly on the timber industry in the Pacific Northwest and in the Southeast for their livelihood. They challenge two regulations promulgated by the Secretary of the Interior ("the Secretary") as contrary to the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544 (1988). They also claim that one of these regulations is void for vagueness. Currently pending before the Court are the parties' cross-motions for summary judgment. The parties agree that there are no genuine disputes of material fact and that this case raises purely legal issues. After careful consideration of the

submission of the parties and the entire record herein, and for the reasons outlined below, the Court will grant defendants' motion for summary judgment and deny plaintiffs' motion for summary judgment.

REGULATORY AND FACTUAL BACKGROUND

The Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1988), was enacted by Congress in 1973 to provide a program for the conservation of endangered species and threatened species and for the preservation of their ecosystems. 16 U.S.C. § 1531(b). Section 4 of the ESA directs the Secretary to designate species of fish, wildlife, or plants as "endangered" or "threatened" in accordance with certain procedures. 16 U.S.C. § 1533(a)(1). The Secretary is also empowered to designate "critical habitat" for such listed species and to develop recovery plans for their survival. 16 U.S.C. §§ 1533(a)(3), 1533(f).

The ESA prohibits certain activities with respect to species that are designated as endangered or threatened. Section 7(a)(2) of the ESA, which applies only to federally-authorized actions, requires all federal agencies to insure that their activities will not "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical. . . ." 16 U.S.C. § 1536(a)(2).

Section 9 of the ESA, which applies to both federal and nonfederal actors, addresses prohibited actions with respect to endangered species only. At issue in this case is the scope of the "take" provision, § 1538(a)(1)(B), which makes it unlawful for any person to "take any [endangered] species within the United States." The ESA defines "take" as follows:

> The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

16 U.S.C. § 1532(19). Although the ESA does not define the terms within this definition any further, the Secretary has promulgated a regulation defining the word "harm" as follows:

> Harm in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

50 C.F.R. § 17.3 (1991).

The prohibition against "takings" set out in § 1538 (a)(1) applies only to those species listed as endangered. However, section 4(d) of the ESA allows the Secretary to extend some or all of the protections in § 1538(a)(1) to threatened species as well:

> Whenever any species is listed as a threatened species . . ., the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife. . . .

16 U.S.C. § 1533(d). Pursuant to this section, the Secretary has adopted a regulation which extends the prohibitions listed in § 1538(a)(1), including the prohibition against "takings," to *all* wildlife species listed as threatened:

> Except as provided in subpart A of this part, or in a permit issued under this subpart, all of the provisions in § 17.21 [which restates the prohibitions outlined in 16 U.S.C. § 1538(a)(1)] shall apply to threatened wildlife, except § 17.21(c)(5).

50 C.F.R. § 17.31(a) (1991).

Plaintiffs in this action are small landowners, small logging companies, and families allegedly dependent on the forest products industry in the Pacific Northwest and in the Southeast. In order to enforce the regulations at 50 C.F.R. § 17.3 and § 17.31(a) and to avoid "harm"-type takings of the northern spotted owl and other threatened wildlife species, the Fish and Wildlife Service ("FWS") has placed restrictions on timber harvesting. Plaintiffs claim that these restrictions have forced them to lay off employees, limited their income from trust lands, reduced the timber supply, and placed some of the plaintiffs in the position of being unable to support their families. They bring this action challenging the "harm" definition at 50 C.F.R. § 17.3 as contrary to the ESA and void for vagueness. Plaintiffs also challenge the Secretary's regulation at 50 C.F.R. § 17.31(a), extending the protections for endangered species to threatened species, as contrary to the ESA.

DISCUSSION

In reviewing an agency's construction of a statute, a court must first determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct.

2788, 2781, 81 L.Ed.2d 694 (1984). Where the statute and the intent behind it are ambiguous with respect to a matter at issue, however, a court must decide whether the agency's construction of the statute is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2782. A court may not substitute its own construction of a statutory provision if the agency's interpretation is "reasonable." *Id.* at 844, 104 S.Ct. at 2782.

A. *The Definition of "Harm" at 50 C.F.R. § 17.3*

1. § 17.3 Does Not Violate the ESA

The Secretary's regulation at 50 C.F.R. § 17.3 defines "harm" to mean "an act which actually kills or injures wildlife"; the harm definition in § 17.3 includes "significant habitat modification or degradation where it actually kills or injures wildlife." Plaintiffs argue that, by establishing habitat modification as a form of harm, this regulatory definition goes beyond the definition that Congress intended for the term "take." Under the ESA, the term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Congress made clear that the definition of "take" was to be interpreted "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S. Rep. No. 307, 93d Cong., 1st Sess. 7 (1973). *See also* H.R.Rep. No. 412, 93d Cong., 1st Sess. 11, 15 (1973) (" 'Take' is defined broadly"; prohibition against "takings" in Section 9 of ESA "includes, in the broadest possible terms, restrictions on the taking,

importation and exportation, and transportation of [endangered] species.")

Notwithstanding this clear intent by Congress to give an expansive definition to the term "take," plaintiffs insist that Congress did not intend the term to reach habitat modification. In support of this contention, plaintiffs make three principal arguments. First, plaintiffs point out that the original ESA bill which was referred to the Senate Committee on Commerce, S. 1983, defined "take," with respect to fish or wildlife, to include "destruction, modification, or curtailment of its habitat or range." The fact that the bill was reported out of committee without any reference to habitat modification in the definition of "take" is an indication, plaintiffs argue, that the Senate intended the scope of the word "take" not to encompass habitat modification.

Plaintiffs are asking this Court to engage in speculation about legislative intent. The Court acknowledges that S. 1983 offered a different definition of the word "take" than the one that was subsequently adopted by the Senate Committee on Commerce. However, the Court notes that S. 1983 was only one of two endangered species bills under consideration by the Senate Committee on Commerce at that time. The other bill, S. 1592, defines "take" exactly as it now appears in the statute. From this legislative history, the Court can conclude no more than that the Senate chose to adopt the definition in one bill over that in another. There is absolutely nothing in the legislative history of the ESA to indicate that the Senate rejected the definition in S. 1983 specifically because it wanted to exclude habitat modification from the definition of take. In fact, the Senate Re-

port indicates just the opposite, that "take" was being defined "in the broadest possible manner."

It may be, as defendants suggest, that the Senate rejected the definition of "take" in S. 1983 because it did not want habitat modification *per se* to constitute a taking; or it may be that the Senate chose to leave the decision of whether to define takings to include habitat modification in the hands of the Secretary. However, the Court will not rely upon such speculation to deduce legislative intent.

Plaintiffs' second argument is that Congress intended to address the problem of habitat modification exclusively through federal land acquisition, not through the take provision. Section 4 of the ESA grants the Secretary the authority to utilize land acquisition measures to carry out conservation programs for endangered and threatened species. *See* 16 U.S.C. § 1534. However, nothing in the language of § 1534 or in the legislative history of the land acquisition provision suggests that Congress intended land acquisition to be the *exclusive* protective mechanism for listed species' habitat. The language and legislative history of § 1534 clearly indicate that Congress considered land acquistion a critical tool in preserving habitat, but they do not suggest that Congress intended it to be the only tool. *See* 16 U.S.C. § 1534(a)(1) ("To carry out such a program [of species conservation], the appropriate Secretary shall utilize the land acquisition and other authority . . .); H.R.Conf.Rep. No. 740, 93d Cong., 1st Sess. 25 (1973) ("Any effective program for the conservation of endangered species demands that there be adequate authority vested in the program managers to acquire habitat which is critical to the survival of those species."); S.Rep. No. 307, 93 Cong., 1st Sess. 4 (1973)

("Often, protection of habitat is the only means of protecting endangered animals which occur on non-public lands.")

Finally, plaintiffs argue that the amendment which added the term "harm" to the ESA definition of "take" was a technical amendment which was never debated and should therefore not be interpreted expansively. *See* 119 Cong.Rec. 25,682-83 (1973) (clarifying amendments offered by Senator Tunney). Plaintiffs' argument itself relies upon an unwarranted expansive reading of the Secretary's regulation. Plaintiffs claim that the § 17.3 definition of "harm," unlike every other component of the "take" definition, "allows land use or habitat modification actions to be barred as takings." Plaintiffs' Mem. for Summary Judgment at 21. The Secretary correctly points out, however, that not all habitat modification actions constitute "harm" under the § 17.3 definition; rather, only an action which "actually kills or injures wildlife" falls into the category of "harm." The Secretary's definition thus requires proof of actual killing or injury to wildlife, consistent with the ESA's definition of "take."

The Court concludes that the Secretary's definition of harm at § 17.3 is entirely consistent with the ESA's definition of take. Congress made clear that it was defining "take" extremely broadly, "to include every conceivable way in which a person can 'take' or attempt to 'take.'" S.Rep. No. 307, at 7. Courts interpreting the "take" definition have consistently upheld the Secretary's definition of "harm" under the ESA. *See TVA v. Hill*, 437 U.S. 153, 184-85 n. 30, 98 S.Ct. 2279, 2297 n. 30, 57 L.Ed.2d 117 (1978); *Palila v. Hawaii Dep't of Land & Natural Resources (Palila I)*, 471 F.Supp. 985 (D.Haw.1979), *aff'd*,

639 F.2d 495 (9th Cir. 1981)[1]; *Palila v. Hawaii Dep't of Land & Natural Resources (Palila II)*, 852 F.2d 1106 (9th Cir. 1982).

It is worth noting that, in 1982, when Congress reauthorized the ESA and amended certain of its provisions, Congress was aware of these court decisions. *See* Endangered Species Act of 1973: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries (hereinafter "Hearings"), 97th Cong., 2d Sess. 291, 329, 331, 343 (1982). Moreover, the precise question at issue in this case arose in the House hearings on the proposed reauthorization bill. One panelist before the subcommittee, Ken Berlin of the National Audubon Society, pointed out that industry groups had been seeking to remove the word "harm" from the ESA's definition of "take" because they disagreed with the Secretary's interpretation of that word to include habitat modification. Hearings, at 290. In response to subsequent questioning by Congressman Edwin B. Forsythe, Robert Carlton of the National Forest Products Association and Mr. Berlin specifically addressed the issue of whether the statutory definition of "take" was intended to include habitat modification. Hear-

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[1] Both the *TVA v. Hill* and *Palila I* decisions were issued when a prior version of the Secretary's regulation was in effect; that prior version also defined "harm" to include habitat modification. The Secretary revised the language of the harm definition in 1981, but without changing its basic meaning. The final regulation simply clarified that habitat modification would not be considered a taking unless there was proof of attendant death or injury. *See* 46 Fed.Reg. 54,748 (November 4, 1981).

ings, at pp. 342-43. Rather than argue about statutory interpretation, Congressman William J. Tauzin turned the panelists' attention to the exemption process in Section 10(a) of the ESA, and the discussion subsequently focused on amending that section to promote its efficiency. *Id.* at 344-46. The reauthorization bill that was eventually adopted by Congress did not amend the original definition of "take" to exclude the word "harm" or to correct the Secretary's definition of that term. Instead, it amended the provisions of the Section 10(a) permit process "to encourage creative partnerships between the public and private sectors and among governmental agencies in the interest of species and habitat conservation." H.Rep. No. 835, 97th Cong., 2d Sess. 30 (1982).

Finally, the structure of the ESA supports the Court's conclusion that Congress intended "take" to be interpreted broadly, even to include habitat modification. Plaintiffs suggests that the § 17.3 definition of "harm" to include habitat modification makes the land acquisition provision of the ESA largely superfluous. However, as defendants point out, there is considerable overlap in the ESA between different provisions of different sections of the ESA, and this overlap is completely consistent with the statute's purpose of attacking the issue of conservation as aggressively as possible. The land acquisition provision of Section 5 offers a solution to the problem of habitat modification through federal spending; the take prohibitions of Sections 7 and 9 offer solutions through civil and criminal sanctions.

The Court thus concludes that the language, structure and history of the ESA reveal that Congress intended an expansive interpretation of the word "take," an interpretation that encompasses habitat

modification. However, even if the Court were somehow to find the ESA "silent or ambiguous" with respect to this issue, it would nevertheless uphold the Secretary's regulation as a reasonable interpretation of the statute. *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2781.

Plaintiffs have not addressed the question of the reasonableness of the Secretary's regulation under the second part of the *Chevron* test. In light of the statute's broad definition of "take," and the absence of any explicit language in the legislative history precluding habitat modification from the scope of that definition, the Court cannot conclude that § 17.3 is an impermissible construction of the statute. Were the Court to reach the second step in *Chevron*, therefore, it must defer to the Secretary's interpretation.

2. § 17.3 Is Not Void for Vagueness

Plaintiffs also claim that the Secretary's definition of "harm" violates the Fifth Amendment's due process guarantee against vague regulations. This constitutional challenge is purely facial; plaintiffs do not allege that they are being threatened with actual criminal enforcement of the regulation.

In general, the void for vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). The primary purpose of the doctrine is to provide citizens with actual notice of offensive conduct, to prevent arbitrary enforcement of criminal laws, and to ensure that such laws establish minimal

guidelines to govern law enforcement. *Id.* at 358, 103 S.Ct. at 1858.

Defendants argue that, in order to succeed in their vagueness challenge, plaintiffs must demonstrate that the regulation is impermissibly vague in all of its applications. They point out that this is a facial challenge which does not implicate any "constitutionally protected conduct" such as expressive rights under the First Amendment. *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 389, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982). Plaintiffs insist that § 17.3 implicates private property rights protected by the Fifth Amendment, and that therefore the broad standard of proof for vagueness outlined in *Flipside* should not apply to their "constitutionally protected conduct."

The Court agrees with plaintiffs that § 17.3 implicates private property rights protected under the Fifth Amendment. It cannot, however, conclude that such Fifth Amendment interests constitute "constitutionally protected conduct" within the meaning of *Flipside*. Rather, the Court must apply the familiar standard outlined in *United States v. Mazurie*, 419 U.S. 544, 550, 95 S.Ct. 710, 714, 42 L.Ed.2d 706 (1975): "[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."

The facts of this case establish that the challenged regulation is not void for vagueness. The definition of "harm" found at § 17.3 clearly limits prohibited conduct to that which "actually kills or injures wildlife." 50 C.F.R. § 17.3. Furthermore, the regulation prohibits only "*significant* habitat modification or degradation," expressly defined as modification or

degradation which "actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." *Id.* (emphasis added) As defendants point out, the determination of whether there has been a violation of this regulation requires an evaluation of the species involved, the biological needs of that species, and the degree of habitat modification, all of which are readily ascertainable. Moreover, the regulation itself requires a finding that actual death or injury to a species has occurred. The terms of the regulation thus clearly provide more than "minimal guidelines" and are sufficiently clear to put a party on notice of prohibited conduct.

Finally, in order to establish a violation of the ESA under this regulation or any other, the government must prove that the charged party *knowingly* committed the violation. *See* 16 U.S.C. § 1540(a) & (b). This intent requirement goes a long way towards vitiating vagueness concerns, since it eliminates the possibility that a person will be prosecuted for conduct which he or she did not know was unlawful. Nor have plaintiffs offered any evidence, other than hypothetical possibilities, that the FWS is enforcing this regulation in an arbitrary and discriminatory manner. The Court therefore concludes that § 17.3 is not impermissibly vague.

B. *The Extension of the Taking Prohibitions at 50 C.F.R. § 17.31(a)*

The Secretary's regulation at 50 C.F.R. § 17.31(a) extends to threatened species all the protections that the ESA affords to endangered species. This regulation was promulgated under the authority set out

in Section 4(d) of the ESA, which states in pertinent part:

> Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife, ...

16 U.S.C. § 1533(d). Plaintiffs argue that § 4(d) imposes limitations on the Secretary's ability to extend the taking prohibitions for endangered species to threatened species. First, they claim that § 4(d) allows such extensions only on a species-by-species basis. Second, they argue that § 4(d) requires any such regulation to be accompanied by an explicit finding that the extension is "necessary and advisable" for the conservation of the threatened species.

The Court cannot accept plaintiffs' arguments. The plain language of the ESA clearly grants the Secretary the authority to promulgate a regulation such as § 17.31(a). Where a statute is clear and unequivocal on its face, a court's decision may rest on the words of the statute itself, at least where it is not manifestly inconsistent with legislative intent. *Gatewood v. Washington Healthcare Corp.*, 933 F.2d 1037, 1040 (D.C.Cir.1991); *Aviation Consumer Action Project v. Washburn*, 535 F.2d 101, 106 (D.C.Cir.1976). In this case, the language of the statute allows the Secretary to "prohibit with respect to *any* threatened species *any* act prohibited under section 1538(a)(1) of this title." 16 U.S.C. § 1533(d) (emphasis added).

The word "any" encompasses the entire range of threatened species and prohibited acts which the Secretary might consider. It allows the Secretary to prohibit one act with respect to one threatened species or as many as *all* acts with respect to *all* threatened species.

Nothing in the language or legislative history of the statute requires the Secretary to promulgate regulations under § 4(d) on a species-by-species basis. On the contrary, the statute gives the Secretary broad discretion to issue regulations "as he deems necessary and advisable." Plaintiffs' reading of this phrase as a requirement that the Secretary must issue some kind of "necessary and advisable" findings in conjunction with any promulgated regulation completely distorts the statutory language. The Secretary is not required to issue *findings* under § 4(d); he is required to issue regulations. To interpret the phrase as plaintiffs suggest would be to rewrite the statute.

The legislative history of the ESA offers no evidence that the Court's plain reading of the language of § 4(d) is "manifestly inconsistent with legislative intent." *Gatewood*, 933 F.2d at 1040. While the legislative record does contain statements which suggest that the Secretary would, under § 4(d), draft regulations on an individual basis for each threatened species, there is nothing in the record to suggest that he is *required* to do so. In fact, the Senate Report evidences Congress' awareness of, and acquiescence in, a more sweeping use of § 4(d). *See* S.Rep. No. 307, 93d Cong., 1st Sess. 8 (1973) (allowing the Secretary to make "any or all" of the acts prohibited for endangered species also prohibited as to threatened species.

The Court thus concludes that § 17.31(a) is not contrary to the ESA.

CONCLUSION

The Court concludes that both of the regulations challenged in this action, 50 C.F.R. § 17.3 and 50 C.F.R. § 17.31(a), are consistent with the ESA. Furthermore, § 17.3 is not void for vagueness. The Court thus will grant defendants' motion for summary judgment and deny plaintiffs' motion for summary judgment. An Order consistent with this Memorandum Opinion will be entered on this date.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed August 12, 1994

No. 92-5255

SWEET HOME CHAPTER OF COMMUNITIES
FOR A GREAT OREGON, ET AL., APPELLANTS

v.

BRUCE BABBITT, SECRETARY OF INTERIOR, ET AL.

On Appellees' Petition for Rehearing and
Suggestion for Rehearing *En Banc*

Before: MIKVA, *Chief Judge;* WILLIAMS and SENTELLE, *Circuit Judges.*

ORDER

Upon consideration of appellees' petition for rehearing, the response thereto, and the reply, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

Chief Judge MIKVA would grant the petition for rehearing and joins in the statement by *Circuit Judge* SILBERMAN dissenting from the Court's denial of appellees' suggestion for rehearing *en banc.*

A statement of *Circuit Judge* WILLIAMS, joined in by *Circuit Judge* SENTELLE, is attached.

Before: MIKVA, *Chief Judge*, WALD, EDWARDS, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, and ROGERS, *Circuit Judges*.

ORDER

Appellees' suggestion for rehearing *en banc*, the response thereto, and the reply, have been circulated to the full Court. The taking of a vote thereon was requested. Thereafter, a majority of the judges of the Court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

Chief Judge MIKVA and *Circuit Judges* WALD, SILBERMAN, and ROGERS would grant the suggestion for rehearing *en banc*.

Separate statement filed by *Circuit Judge* SILBERMAN, dissenting from the denial of rehearing *en banc*.

WILLIAMS, *Circuit Judge*. In seeking rehearing, the government offers a number of ill-founded critiques of the panel opinion, 17 F.3d 1463 (D.C. Cir. 1994).

1. The government suggests broadly that the panel found the harm regulation, 50 C.F.R. § 17.3, invalid on the basis of false assumptions as to its meaning. See Petition for Rehearing and Suggestion for Rehearing En Banc 6-9. Specifically, the government contends that the panel (a) disregarded the regulation's requirement that the habitat modification involve "affirmative action which creates death or disturbance to essential behavioral patterns with sig-

nificant and permanent, injurious effects", Petition at 8, and (b) manifested its misunderstanding of the regulation by referring to third parties' claims made about necessary grizzly bear habitat, *id.* at 8-9.

It is the government that misrepresents the regulation. The Department of Interior in fact requires no "affirmative action." Quite the contrary. The Department carefully specified that there was no need to refer expressly to *omissions* because the text as a whole make clear that omissions were embraced as fully as acts of commission. *Final Redefinition of "Harm"*, 46 Fed. Reg. 54,748, 54,750 (Nov. 4, 1981) ("the phrase 'or omission' was deleted since the Service feels that 'act' is inclusive of either commissions or omissions which would be prohibited by section 9"). The Department inserted the word "actually" before "kills or injures" in its redefinition of harm merely to underscore the need for a causal link—a showing that the "significant and permanent effects" on the species have been "due to a party's action." *Id.* at 54,749.

Further, the grizzly example cited in the text, 17 F.3d at 1465, makes quite clear that the panel understood that the regulation addressed habitat modifications that would be *fatal* to members of the species. It refers to a contention that " 'as many as 35 million to 42 million acres of land are *necessary to the survival* of grizzlies'.". *Id.* (emphasis added). If that habitat is "necessary to [the grizzlies'] survival", then any material curtailment must involve death for members of the species.[1]

2. The government argues that the panel misstated the legislative history when it suggested a

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[1] Equally clearly, the panel did not endorse the specific claim of what acreage may actually be "necessary".

parallel between the ban on habitat modification *retained* in the Act as applied to federal government actors, 17 F.3d at 1466, and the "habitat modification" explicitly *deleted* from the draft provision governing private actors, *id.* at 1467. See Petition at 8. The panel made the point both in noting the apparent structure of the Act (contrasting the imposition of "very broad burdens" on a narrow segment of society, the federal government, and relatively narrow burdens on all others), and in suggesting the significance of the Senate Committee's deletion of the bill's reference to "habitat modification" as one of the ways in which a person might "take" members of an endangered species. The suggested parallelism is false, says the government, because the statutory ban on habitat modification by federal agencies is far broader, reaching such modifications "whether destruction of the habitat would actually kill or injure the species". Petition at 8.

Again the government misrepresents. The panel quoted the provision applying to the government, "destruction or adverse modification of habitat . . . which is determined . . . to be *critical*", § 7(a)(2), Endangered Species Act, 16 U.S.C. § 1536(a)(2) (emphasis added (quoted in 17 F.3d at 1466). The statute in turn defines "critical habitat" in terms of characteristics "*essential* to the conservation of the species", 16 U.S.C. § 1532(5)(A)(i) & (ii) (emphasis added), which seems to be simply another way of referring to habitat modifications so significant to the species that they might lead to death (or at least some very serious injury) for members of the species. In looking at the Department's regulations discussing modifications of "critical" habitat under § 7, and habitat modifications that are forbidden under the Department's view of § 9, we are unable to discern any substantive, operational difference, and the gov-

ernment has not identified any. Compare, e.g., 50 CFR § 17.94 (regulations implementing § 7 preclude "destruction or adverse modification of the constituent elements *essential to conservation* of the listed species") (emphasis added) with 46 Fed. Reg. 54,748, 54,750 ("[t]o be subject to section 9, the modification or degradation must be *significant*, must *significantly impair essential* behavioral patterns, and must result in *actual* injury to a protected wildlife species") (emphasis in original). If there are "essential" habitat elements whose removal or destruction causes no injury, the government cites no example and it is hard to imagine one. Michael Bean, Senior Counsel for the Environmental Defense Fund, recognized the virtual identity between what the Senate deleted from § 9 and what it retained in § 7 when he wrote, not long after the Act passed, "if 'taking' comprehends habitat destruction, then it is at least doubtful whether Section 7 of the Act is even necessary." Michael J. Bean, *The Evolution of National Wildlife Law* 397 (1977). But see Michael J. Bean, *The Evolution of National Wildlife Law* 342 (Revised & Expanded Edition 1983).

To the extent that there may be some theoretical difference between habitat modification under § 7 and under the Department's regulations purporting to implement § 9, practical realities limit its role to pure theory. As noted in the panel opinion, § 10(a) authorizes the advance issuance of permits for "incidental taking". 17 F.3d at 1467-68. As a practical matter, persons whose extended conduct might be found a "take", and who thus are exposed to the criminal penalties of 16 U.S.C. § 1540(b) (see also 18 U.S.C. §§ 3559(a)(6), 3571(b) & (e)), are under commanding pressure to comply with § 10(a) plans. The Department recognizes this reality. "Much of the pri-

vate land which would be covered by the long-term HCP [habitat conservation plan] cannot be developed due to the prohibitions of section 9 of the Act. In order for many planned development projects to proceed in compliance with the Act, a permit for incidental take must be obtained." *Notice of Intent to Prepare an Environmental Impact Statement to Allow Incidental Take of the Threatened Desert Tortoise (Gopherus agassizii) Under Section 10(a)(1)(B) of the Endangered Species Act and Notice of Public Meetings*, 59 Fed. Reg. 5439 (Feb. 4, 1994). And the Department explicitly recognizes the restrictions that it imposes under § 10(a) as "equivalent" to those it imposes under § 7 to protect "critical habitat". See *Special Rule Concerning Take of the Threatened Coastal California Gnatcatcher*, 58 Fed. Reg. 65,088, 65,089-90 (Dec. 10, 1993) (taking permitted under § 10(a) plan for California gnatcatcher "will not appreciably reduce the likelihood of survival and recovery of the gnatcatcher in the wild. This criterion is *equivalent* to the regulatory definition of 'jeopardy' under section 7(a)(2) of the Act") (emphasis added).[2]

3. To the extent that the government seeks to convey the impression that its enforcement of the harm regulation never entails the exercise of power over large tracts of land, the impression is false. The Department's § 10(a) plans, into which § 9 collapses de facto, are often sweeping. The plan to protect the

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[2] Technically the restrictions were under § 4(d) of the Act, 15 U.S.C. § 1533(d), because the gnatcatcher is not an endangered but a "threatened" species. But the Department by regulation has made the anti-take provisions fully applicable to threatened species, so the rule in effect implements § 9 (through the lens of § 10(a)). See *Sweet Home Chapter v. Babbitt*, 1 F.3d 1, 5-8 (1993).

California gnatcatcher, for example, covers 3.8 million acres. *Special Rule Concerning Take of the Threatened Coastal California Gnatcatcher*, 58 Fed. Reg. at 65,090.

* * * * *

The government faults the panel for failing to specify whether the regulation's excess of statutory authority failed under the first or second "step" of the analysis set forth in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), Petition at 9-10, and in a more general way for failing to give the agency the deference that is its due under *Chevron*. Because the court in determining whether Congress "unambiguously expressed" its intent on the issue, see 467 U.S. at 843, is to employ all the "traditional tools of statutory construction", *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987), the factors involved in the first "step" are also pertinent to whether an agency's interpretation is "reasonable". Thus the exact point where an agency interpretation falls down may be unclear. (Indeed, the *Chevron* Court itself never specified which step it was applying at any point in its analysis, see 467 U.S. at 859-66.)

Nonetheless, we conclude that the statute, fairly read in the light of the "traditional tools of statutory interpretation", manifests a clear determination by Congress that the prohibition of § 9 should not reach habitat modifications as defined by the Department, where there is no direct action by the defendant against any member of the species. Extending the word "harm" to reach habitat modification as so conceived carries § 9's prohibition far beyond the reach effected by all the other terms used in the definition; it applies to every citizen duties the Act expressly im-

posed only on federal government agencies; and it ignores the plausible inferences from the Senate's deletion of the phrase "habitat modification" from the draft bill. The extension vests the Department with authority to supervise the use of privately owned land in vast tracts of the United States, even to the point of forbidding modest clearing efforts conducted in the interest of fire protection in populated areas. See *Determination of Threatened Status for the Coastal California Gnatcatcher*, 58 Fed. Reg. 16,742, 16,753 (March 30, 1993); *Determination of Endangered Status for the Delhi Sands Flower-loving Fly*, 58 Fed. Reg. 49,881, 49,884-86 (Sept. 23, 1993) (destruction of species habitat by removal of native vegetation for fire prevention on private land could be interpreted to constitute take); (fly "rare to absent" in former habitat sites currently "degraded by ongoing soil disturbances, caused by grading, plowing, discing, to remove vegetation for fire control, and off-road vehicle use", *id.* at 49,884/3-85/1/ destruction of habitat "could be interpreted to constitute take", *id.* at 49,886/2). Congress clearly did not hang so massive an expansion of government power on so slight a nail as § 9's provision that no one should "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" an endangered species.

The petition for rehearing is

Denied.

SILBERMAN, *Circuit Judge*, dissenting from the denial of rehearing *en banc*, with whom MIKVA, *Chief Judge*, and WALD, *Circuit Judge*, join: I find this case quite troublesome, as much for what is not argued by the parties, and therefore not discussed by the court, as for what is. Keeping in mind that we are dealing with a criminal statute, I am not at all sure that *Chevron* even governs our review. *Cf. United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2110 & nn.9 & 10 (1992) (plurality opinion). That is to say, the *Chevron* presumption—that Congress has delegated to the administrating agency primary authority to reconcile ambiguities in statutory language—may not apply when the statute contemplates criminal enforcement. *Cf. Kelley v. EPA*, 15 F.3d 1100, 1007 (D.C. Cir. 1994). The petitioner does not raise that concern, but it surely is not a separate claim that the petitioner has affirmatively waived.

It is, therefore, not necessary in order to direct briefing on that question to rely on *United States Nat'l Bank v. Independent Ins. Agents, Inc.*, 113 S. Ct. 2173 (1993), in which the Supreme Court proclaimed unrestrained judicial discretion to decide any issue analytically anterior to the controversy before it, even if the plaintiff affirmatively waived the claim (which means, I gather, in the typical contract breach suit where both parties agree that the contract was formed but dispute only whether there was a breach, a federal court *can, sua sponte*, force the parties to litigate whether the contract was actually formed). Since the Court did not even purport to announce a rule governing this sort of discretion (which some might think implies that its opinion on this issue is not even law), I take it that no federal judge is bound

to exercise the discretion that the Supreme Court obviously wished to preserve for itself.[1]

Indisputably, however, ripeness issues which go to our jurisdiction should be raised by a federal court *sua sponte*, and I rather doubt the ripeness of the appellant's facial challenge to the Department of Interior regulation. I can imagine a string of hypotheticals which range from "habitat modifications" that are sufficiently close to the core concept that the majority believes animates the statutory language as to be surely included within the word "harm" to ones that seem clearly inconsistent with the statute. Suppose, for example, that someone wished to kill all the birds on a particular piece of property and could do so by draining a marsh. If that person did so, would not his actions properly be thought to "harm" the endangered species?

Assuming the challenge to the regulation is ripe and that *Chevron* controls our review, I think the Chief Judge has the better of the argument. Were I interpreting this statute with deference, given its language and legislative history, I would certainly be troubled about any construction that might preclude a landowner from using his property for ordinary purposes just because it could be thought that an endangered species was somehow disadvantaged. I do not think, however, that the majority has submitted to the discipline of the *Chevron* framework and given the Department of Interior its due defer-

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[1] It has recently been suggested that the Supreme Court is really a quasi-judicial institution. *See* Thomas W. Merrill (the John Paul Stevens Professor at Northwestern), *A Modest Proposal For a Political Court*, 17 HARV. J.L. & PUB. POL'Y, 137, 139 (1994).

ence. It was certainly not apparent whether the majority's initial opinion rested on *Chevron* Step I or Step II. In its response to the government's petition for rehearing, the panel majority appears to shift perceptibly to a Step I "clear determination by Congress," against which no deference to the agency's interpretation is appropriate. I do not find in either the statutory language or the legislative history any such fixed view. And at the second step (which is where I would analyze the case), maxims of statutory construction like *noscitur a sociis*, although not totally irrelevant, certainly have less force. *See Michigan Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285, 1292-93 (D.C. Cir.), *aff'd per curiam by an equally divided court*, 493 U.S. 38 (1989). I quite agree with the panel that "the factors involved in the first 'step' are also pertinent to whether an agency's interpretation is 'reasonable,'" *see* Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L.REV. 821, 827 (1990); but when thinking of the statute at that second step, one must assume that the statute has more than one plausible construction as it applies to the case before you. If the agency offers one—it prevails.

In any event, the issue would seem of sufficient importance, particularly in light of the circuit split, *cf. Palila v. Hawaii Dep't of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988), to warrant *en banc* treatment.

APPENDIX E

[Filed Mar. 11, 1994]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-5255

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL., APPELLANTS

v.

MANUEL LUJAN, JR., Secretary of Interior, ET AL.

BEFORE: Mikva, Chief Judge; Williams and Sentelle, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing and of the response thereto, it is

ORDERED, by the Court, that the petition is granted, as is set forth in the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
RON GARVIN
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Date: March 11, 1994

Opinion for the court on petition for rehearing filed by Circuit Judge Williams.

Concurring opinion filed by Circuit Judge Sentelle.

Dissenting opinion filed by Chief Judge Mikva.

APPENDIX F

[Filed Mar. 11, 1994]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-5255

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL., APPELLANTS

v.

MANUEL LUJAN, JR., Secretary of Interior, ET AL.

BEFORE: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

Appellant's Suggestion For Rehearing *In Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *in banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:
RON GARVIN
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX G

STATUTORY PROVISIONS

The Endangered Species Act of 1973, as amended and codified at 16 U.S.C. 1531 *et seq.*, provides in relevant part:

§ 1532. Definitions

For the purposes of this chapter—

* * * * *

(19) The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

* * * * *

§ 1536. Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or

result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a)(2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is

mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371 (a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological assessment

(1) to facilitate compliance with the requirements of subsection (a)(2) of this section, each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary ad-

vises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of re-

sources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

* * * * *

(h) Grant of exemption

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5) of this section. The Committee shall grant an exemption from the requirements of subsection (a)(2) of this section for an agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4) of this section and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of

resources prohibited by subsection (d) of this section; and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of Title 5.

(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action—

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) of this section with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless—

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a)(2) of this section or was not identified in any biological assessment conducted under subsection (c) of this section, and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

* * * * *

(*o*) Exemption as providing exception on taking of endangered species

Notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C) of this title, sections 1371 and 1372 of this title, or any regulation promulgated to implement any such section—

(1) any action for which an exemption is granted under subsection (h) of this section shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.

* * * * *

§ 1538. Prohibited acts

(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section

1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

* * * * *

§ 1539. Exceptions

(a) Permits

(1) The Secretary may permit, under such terms and conditions as he shall prescribe—

(A) any act otherwise prohibited by section 1538 of this title for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts

necessary for the establishment and maintenance of experimental populations pursuant to subsection (j) of this section; or

(B) any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

(2)(A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a conservation plan that specifies—

(i) the impact which will likely result from such taking;

(ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;

(iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and

(iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

(B) If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan that—

(i) the taking will be incidental;

(ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

(iii) the applicant will ensure that adequate funding for the plan will be provided;

(iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(v) the measures, if any, required under subparagraph (A) (iv) will be met;

and he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.

(C) The Secretary shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit.

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